MINNESOTA PRACTICE SERIES™

Volume 4

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Sixth Edition

CIVIL
[CIVJIG]

Categories 10—59

2021–2022 Pocket Part

Issued in September 2021

Prepared by the

MINNESOTA DISTRICT JUDGES ASSOCIATION
COMMITTEE ON JURY INSTRUCTION GUIDES—
CIVIL

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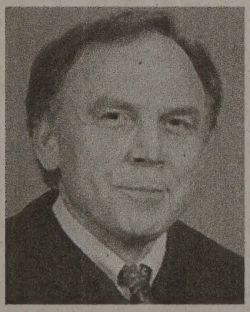
Preface

The 2021-2022 Pocket Part updates the Authorities for several jury instructions. It includes a new jury instruction, CIVJIG 80.44 on the vicarious liability of a hospital for emergency room services. A new special verdict form, CIVSVF 80.99, accompanies the new instruction for use in appropriate cases. These new materials align with the Minnesota Supreme Court's decision in *Popovich v. Allina Health System*, 946 N.W.2d 885 (Minn. 2020).

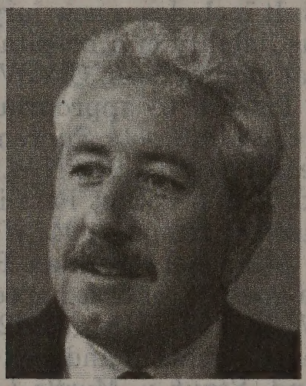
Key cases covered in this Pocket Part include discussions of *Abel v. Abbott Northwestern Hospital*, 947 N.W.2d 58 (Minn. 2020) (applicability of the Minnesota Human Rights Act to unpaid practicum students, a question of first impression); *Hall v. City of Plainview*, 954 N.W.2d 254 (Minn. 2021) (considering the interplay between employment handbook provisions and disclaimer language); and, *Staub v. Myrtle Lake Resort, LLC*, No. A20-0267, 2020 WL 7330583 (Minn. Ct. App. Dec. 14, 2020), *rev. granted* (Minn. Feb. 14, 2021) (a wrongful death case raising important causation issues now pending before the supreme court).

This Pocket Part also contains a significant revision to CIVJIG 10.20, the jury instruction setting out the post-trial preliminary statement of the duties of a jury. The revision is based on work done by the Committee for Equality and Justice. The new section of the instruction contains important language instructing jurors on impartiality, fairness, and bias.

Finally, the Committee and the Reporters extend heartfelt thanks to Judge Kathryn Messerich, who this year concludes her service as chair of our Committee. Judge Messerich began her term as chair in 2012, and the Committee has benefitted from her patience, her insight, and her gracious persistence. We are all grateful for her work.



Judge Dan Kammeyer was a Minnesota Fourth Judicial District judge for Anoka County, Minnesota. He served as a County Court Judge from 1979 to 1982, when he was appointed to the district court bench in 1979 by Governor Al Quie. He retired in the fall of 2008. He was a long-time chair of the Minnesota District Judges Jury Instruction Guide Committee.



Judge David Duffy was a Minnesota Fourth Judicial District judge for Hennepin County, Minnesota. He was appointed to this position in 1987 and was elected to full terms in 1988, 1994, 2000 and 2006. He retired in the fall of 2012, but continued to serve on the Minnesota District Judges Association Civil Jury Instruction Guides Committee.

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Volume 4A

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PART I

TRIAL PROCESS

CATEGORY 10

DUTIES OF THE JURY

CIVJIG 10.20

POST-TRIAL PRELIMINARY STATEMENT—DUTIES OF JUDGE AND JURY

Replace the existing section "Impartiality" with the following:

Impartiality, fairness, and bias

You cannot take sides based on personal likes, dislikes or prejudices.

We all have feelings, assumptions, perceptions, fears, and stereotypes about others—we call these "biases." Some biases we are aware of and others we might not be fully aware of, which is why they are called "implicit" or "unconscious biases."

No matter how unbiased we think we are, our brains are hardwired to make unconscious decisions. We look at others, and filter what they say, through the lens of our own personal experience and background. Because we all do this, we often see life – and evaluate evidence – in a way that tends to favor people who are like ourselves or who have had life experiences like our own. We can also have biases about people like ourselves. One example of implicit bias is the association of males with career and females with family. Bias can affect our thoughts, how we remember what we see and hear, whom

we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make an important decision in this case. You must:

1. Take the time you need to reflect carefully and thoughtfully about the evidence.

2. Think about why you are making the decision you are making and examine it for bias. Reconsider your first impressions of the people and the evidence in this case. If the people involved in this case were from different backgrounds — for example, richer or poorer, more or less educated, older or younger, or of a different gender, gender identity, race, religion, or sexual orientation— would you still view them, and the evidence, the same way?

3. Listen to one another. Resist and help each other resist, any urge to reach a verdict influenced by bias. Each of you have different backgrounds and will be viewing this case in light of your own insights, assumptions, and biases. Listening to different perspectives may help you to better identify the possible effects these hidden biases may have on decision-making.

4. Resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or other unconscious biases.

The law demands that you make a fair decision, based solely on the evidence, your individual evaluations of that evidence, your reason and common sense, and these instructions.

You must not be concerned that a particular answer on the verdict form is favorable to one party or the other.

USE NOTE

Add to the end of Use Note:

Because the risk of bias is universal, the Committee recommends that the impartiality, fairness, and bias instruction be given in every case. Judges may find it useful to review this instruction periodically and in cases in which they are the finders of fact.

PART II

GENERAL AREAS OF LAW

DIVISION A

CONTRACT AND WARRANTY

CATEGORY 20

CONTRACT

INTRODUCTORY NOTE

Construction of Contracts

Add the following after the first paragraph of the section at p. 66 of the main volume:

Staffing Specifix, Inc. v. TempWorks Management Services, Inc., 896 N.W.2d 115 (Minn. Ct. App. 2017), aff'd, 913 N.W.2d 687 (Minn. 2018), involved a dispute between Staffing, a temporary staffing agency, and the defendants, a group of family-owned companies that provided payroll, software, and other "incubator" services to smaller staffing companies like the plaintiff. Staffing decided not to continue its business relationship with TempWorks and brought a lawsuit alleging a variety of claims, including breach of contract. The trial court determined that the contract between the parties was ambiguous and permitted the parties to introduce parol evidence to determine the parties' intent. At the close of evidence, the trial court instructed the jury that, if it found the contract ambiguous, it should determine the intent of the parties. The trial court also instructed the jury that ambiguous terms should be construed against the drafter.

The court of appeals held, first, that because whether a contract is ambiguous is a question of law and the trial court already had determined the contract was ambiguous, it was error to instruct the

jury in a way that allowed the jury to determine ambiguity. To aid the jury in its interpretation, the trial court should have directed the jury as to which terms were ambiguous. *Staffing Specifix*, 896 N.W.2d at 129–30. Second, the court of appeals held that the parties had relatively equal bargaining power and the agreements between the parties were not contracts of adhesion. As such, it was error to instruct the jury to construe ambiguity against the drafter. "A correct instruction would have made clear that the jury first considers evidence of the intent of the parties to construe ambiguous terms. If an examination of the evidence failed to demonstrate the intent of the parties, then and only then, should the jury have been instructed to construe ambiguous contract terms against the drafter." *Staffing Specifix*, 896 N.W.2d at 132.

Affirming the court of appeals, the supreme court stated, first, that "determining whether contract terms are ambiguous is unquestionably the role of the court, and not of the jury." *Id.* 913 N.W.2d at 692. The supreme court ruled, second, that "[o]nly if a preponderance of the evidence does not prove the parties' intent should the jury construe ambiguous terms against the drafter." *Id.* at 693.

CIVJIG 20.10

CONTRACT—ELEMENTS

USE NOTE

Add at the end of "USE NOTE" as a new paragraph:

Clear and convincing evidence is required to prove that an oral contract for the sale of land existed, regardless of whether the party seeks damages or specific performance. *Christie v. Estate of Christie*, 911 N.W.2d 833, 839 (Minn. May 16, 2018); and Minn. Stat. § 513.05 (the Statute of Frauds). For instruction language on clear and convincing evidence, *see* CIVJIG 94.10.

AUTHORITIES

Add to end of Authorities:

In *Walker v. Walker*, No. A-20-0675, 2021 WL 955947 (Minn. Ct. App. Mar. 15, 2021), the court of appeals considered the enforceability of an oral contract for the transfer of family farm land from parents to son. The plaintiff, Eric Walker, alleged that his parents, Steven and Lynn Walker, agreed to give him 80 acres of land to compensate him for work on the family farm over a period of years. The case was tried to a jury, which found that there was an oral contract to transfer the land to Eric in exchange for the outstanding debt owed to Eric, that there was an oral contract by his parents to compensate Eric for his services, and that his parents were unjustly enriched because Eric conferred a benefit on them and it would not be fair for them to retain that benefit. *Id.* at *4.

On appeal from the denial of her motion for JMOL, Lynn Walker argued, among other things, that the alleged oral contract failed to satisfy the statute of frauds and that the evidence was insufficient to establish the formation of an enforceable contract.

The court of appeals concluded that the required elements of a contract were established by clear and convincing evidence, which is the standard for proof of oral contracts for the sale of land. The court applied the "highly probable" standard for clear and convincing evidence drawn from the supreme court's decision in *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978). To meet that standard, the court noted that "the facts 'must be consistent and not contradictory, clear and not equivocal, convincing and not doubtful.' " 2021 WL 955947, at *6 (quoting *Christie v. Estate of Christie*, 911 N.W.2d 833, 840 (Minn. 2018) (quoting *Theisen's, Inc. v. Red Owl Stores, Inc.*, 243 N.W.2d 145, 148-49 (Minn. 1976))).

The court also held that the statute of frauds, Minn. Stat. § 513.05, was avoided because of Eric Walker's part performance, an exception under Minn. Stat. § 513.06 that allows a court of equity to compel specific performance of an otherwise void contract. The court noted that the jury was not instructed on the part performance question nor was there a special verdict interrogatory on the issue, omissions that Lynn Walker argued required the district court to apply the statute of frauds. Because she did not ask for a jury instruction on the statute of frauds or part performance, the court of appeals was satisfied that the district court implicitly found part performance. 2021 WL 955947, at *7 n.5.

CIVJIG 20.40

OFFER—CONSIDERATION

AUTHORITIES

Add the following to Authorities in Volume 4, p. 86, after the fourth full paragraph:

In *Medical Staff of Avera Marshall Regional Medical Center v. Avera Marshall*, 857 N.W.2d 695 (Minn. 2014), the supreme court held that hospital bylaws were an enforceable contract. The case arose out of the announcement by the Avera Marshall Regional Medical Center to repeal the hospital's medical staff bylaws and replace them with revised bylaws. Members of the medical staff, the chief of staff, and chief of staff-elect brought suit, asking for a declaration that the medical staff bylaws constituted an enforceable contract between the medical staff and Center. The Center argued that the bylaws were not a contract between the staff and Center because there was a pre-existing obligation to adopt the bylaws, pursuant to Minn. R. 4640.0800, subp. 2.

The supreme court noted that if there is a pre-existing obligation, a promise to enforce that obligation creates no benefit and no consideration. The court also noted that while there was an obligation under the rule requiring the adoption of bylaws, that requirement was only a minimum requirement, and, in addition, that each medical staff member had to agree to be bound by the bylaws as a condition of employment. The court concluded:

> The record in this case indicates that Avera Marshall formed a contractual relationship with each member of the Medical Staff upon appointment. Avera Marshall offered privileges to each member of the Medical Staff, so long as the Medical Staff member agreed to be bound by the medical staff bylaws as a condition of appointment. Each member of the Medical Staff who accepted Avera Marshall's offer of appointment agreed to be bound by the bylaws. Thus, there was a bargained-for exchange of promises and mutual consent to the exchange. Importantly, there was also consideration. Both Avera Marshall and the members of its Medical Staff voluntarily assumed obligations on the condition of an act or forbearance on the part of the other.

857 N.W.2d at 702-03 (footnotes omitted).

CATEGORY 22

WARRANTY

INTRODUCTORY NOTE

Add to end of the Introductory Note:

Vermillion State Bank v. Tennis Sanitation, LLC, 947 N.W.2d 456 (Minn. Ct. App. 2020), *rev. granted* (Minn. Sep. 15, 2020), arose from the alleged breach of an oral contract. Following a jury trial, the district court allowed the jury to decide the contract's predominant purpose via a special verdict question. The court of appeals ruled that this was error. "[R]elevant Minnesota caselaw requires that the district court, not the jury, determine the applicability of the UCC in a given case." *Id.* at 468 (citing *Valley Farmers' Elevator v. Lindsay Bros. Co.*, 398 N.W.2d 553, 556 (Minn. 1987)).

CIVJIG 22.40

EXCLUSION OR MODIFICATION OF WARRANTIES

AUTHORITIES

Add to end of Authorities:

In *Sorchaga v. Ride Auto, LLC*, 909 N.W.2d 550 (Minn. 2018), the supreme court held that Ride Auto's fraudulent statements rendered its purchase agreement disclaimers with Sorchaga ineffective under Minn. Stat. § 336.2-316(3)(a) (2016). The case arose out of Sorchaga's purchase of a salvaged pickup truck from Ride Auto. Sorchaga noted certain problems with the truck, which were explained away by Ride Auto's employees or owner. Various notations concerning the problems were on the signed purchase agreement, including that the truck had a salvage title, but the purchase agreement "disclaimed all warranties and stated that Sorchaga purchased the truck "AS IS, NO WARRANTY." Sorchaga also signed a buyer's guide, which stated that the truck was sold "AS IS—NO WARRANTY."

Sorchaga was told that she would receive a third-party warranty, the ASC Vehicle Protection Plan. Ride Auto's owner told her that the ASC agreement would be provided without cost and that it would entitle her to have her truck inspected anywhere, and that it would cover any costs of repairs at no cost to her.

Sorchaga experienced problems with the truck immediately after purchasing it. She brought it to Ride Auto, which refused to repair the truck. She called ASC, but was informed that the warranty in the agreement was inapplicable because the truck was a salvage vehicle. Eight days after she purchased the truck she had it towed to a dealer and inspected. The inspection costs were $1,415. She was told that that the truck need a full engine replacement at a cost of approximately $20,000.

Sorchaga sued Ride Auto, and its surety company, Western Surety Company, alleging breach of the implied warranty of merchantability, violation of the federal Magnuson-Moss Warranty Act, and fraud. Following trial, the district court found for Sorchaga on all counts, concluding that " '[t]he employees of Ride Auto made misrepresentations and false representations to [Sorchaga] with respect to the condition, value, quality or fitness of the truck for any purpose for which a truck is purchased.' " The district court found that Ride Auto's owner knew there was serious engine damage to the truck, and that he did not correct the statements of the salesman that the reason the check-engine light was on was due to a faulty oxygen sensor. The district court also concluded that Ride Auto's owners and employees knowingly made false represen-

tations to the plaintiff as to the truck problems and what the ASC Warranty would cover. The court awarded Sorchaga damages in the amount of $14,366.03, which was the purchase price of the truck, the cost of the dealer's inspection, and $21,949.35 in attorney fees and litigation expenses. Ride Auto appealed to the court of appeals, which affirmed. The supreme court affirmed the court of appeals.

There were two issues on appeal. The first was whether the fraudulent statements about the truck's fitness for the purpose for which it was purchased rendered the "as is" disclaimers in the purchase agreement ineffective under the Uniform Commercial Code, Minn. Stat. § 336.2-316(3)(a) (2016). The second was whether the district court erred in awarding damages under both the implied warranty and fraud theories of liability.

Minn. Stat. § 336.2-316(2) provides for the exclusion or modification of the implied warranty of merchantability. Minn. Stat. § 336.2-316(3) provides that subsection (2) notwithstanding:

> (a) *unless the circumstances indicate otherwise*, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. . . .

(Emphasis added). The parties disputed the meaning of "unless the circumstances indicate otherwise."

Following a lengthy analysis of the meaning of the phrase, the supreme court held that "Ride Auto's fraudulent statements about the fitness of the truck for the purpose for which a truck is purchased are a circumstance that make the 'as is' disclaimers of implied warranties in the purchase documents ineffective under Minn. Stat. § 336.2-316(3)(a)." *Id.* at 557.

The court also held that the UCC and fraud remedies were not inconsistent, provided that the plaintiff did not receive a double recovery for her damages. *Id.* at 557–58.

CATEGORY 23

FIDUCIARY DUTY

CIVJIG 23.10

FIDUCIARY DUTY

AUTHORITIES

Add to authorities at end of A. Fiduciary Relationships:

Soderberg & Vail, LLC v. Meshbesher & Spence, LTD., No. 27-CV-12-23143, 2016 WL 22251 (Minn. Ct. App. Jan 4, 2016), arose out of a claim by Soderberg & Vail, LLC (S & V) against Meshbesher & Spence, LTD (M & S), for a portion of the attorney fees that the Meshbesher law firm received in a personal injury lawsuit referred to it by the Soderberg law firm. The plaintiff law firm advanced several theories of recovery, including breach of fiduciary duty.

The court of appeals rejected the claim, based on its conclusion that there was no fiduciary relationship. The court noted that a fiduciary relationship exists between partners in a joint venture, but held that the elements of a joint venture were not met because S & V did not exercise any control over any part of the case after referral, and because the arrangement of a fixed percentage of recovery was not a sharing of profits. *Id.* at *5.

S & V also argued that because M & S had a greater degree of control over the referred case, "M & S was in a superior position to S & V, which created a fiduciary relationship." The court of appeals also rejected that argument:

> "A fiduciary relationship is characterized by a 'fiduciary' who enjoys a superior position in terms of knowledge and authority and in whom the other party places a high level of trust and confidence." *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 330–31 (Minn.App.2007) (citing *Toombs*, 361 N.W.2d at 809), review denied (Minn. Aug. 21, 2007). In contrast, an ordinary business relationship may involve reliance on a professional, implying "a certain degree of trust and a duty of good faith," but the relationship is not classified as fiduciary. Id. at 331.

The relationship between the parties here is not one of the types of relationship identified by Minnesota courts as fiduciary. 4 Minnesota Practice, CIVJIG 23.10 (2014) (identifying the categories of relationships found to be fiduciary). And this relationship between two sophisticated professional entities did not reflect the type of authority imbalance and the level of trust and confidence that would indicate a fiduciary relationship existed. S & V had a business relationship with M & S, and although S & V could expect M & S to act in good faith, the firm did not have a relationship of trust and confidence that constitutes a fiduciary relationship.

2016 WL 22251, at *5.

DIVISION B

NEGLIGENCE

CATEGORY 25

FAULT AND CULPABILITY

CIVJIG 25.10

NEGLIGENCE AND REASONABLE CARE—BASIC DEFINITION

AUTHORITIES

Add the following to end of Authorities:

In *Senogles v. Carlson*, 902 N.W.2d 38 (Minn. 2017) (*see* CIVJIG 82.25, 2018-19 Supplement); and *Montemayor v. Sebright Products, Inc.*, 898 N.W.2d 623 (Minn. 2017) (*see* CIVJIG 75.20, 2018-19 Supplement), the supreme court held that in resolving duty issues, landowner's duty of reasonable care in *Senogles* and the duty to design a safe product in *Montemayor*, foreseeability is a question for the jury in "close cases."

CIVJIG 25.35

GROSS NEGLIGENCE

A portion of the definition of "negligence" is repeated in the instruction. The instruction should read as follows:

Definition of "reasonable care"

Reasonable care is the care a reasonable person would use in the same or similar circumstances.

Definition of "negligence"

Negligence is the failure to use reasonable care.

Ask yourself what a reasonable person would have done in these circumstances.

Negligence occurs when a person:

1. Does something a reasonable person would not do; or

2. Fails to do something a reasonable person would do.

Gross negligence

Gross negligence is more than just negligence. It is negligence of the highest degree.

CIVJIG 25.40

WILLFUL CONDUCT

AUTHORITIES

Add the following to Authorities in Volume 4, p. 198, before the final paragraph:

In *Shariss v. City of Bloomington*, 852 N.W.2d 278 (Minn. Ct. App. 2014), the court of appeals held that official immunity did not apply in a case where a snowplow driver backed up into the plaintiff in order to make room for a school bus. The City's snow removal policy did not directly address cases where a snowplow driver was maintaining traffic flow, although it is a standard operating procedure. While noting that "[a] ministerial duty need not be 'imposed by law' and may arise from an 'unwritten policy' or 'protocol' that dictates a particular course of conduct," *id.* at 280, quoting Anderson v. Anoka Hennepin Independent School District 11, 678 N.Wl.2d 651, 657–59 (Minn. 2004), the court held that "[d]enying immunity in this case does not implicate the concerns of deterring snowplow drivers from exercising their judgment when making the difficult decisions that may arise in the often-hazardous activity of snow removal." *Id.* at 283.

CATEGORY 27

CAUSATION

CIVJIG 27.10

DIRECT CAUSE

AUTHORITIES

Add to end of Authorities:

Staub v. Myrtle Lake Resort, LLC, No. A20-0267, 2020 WL 7330583 (Minn. Ct. App. Dec. 14, 2020), *rev. granted* (Minn. Feb. 14, 2021), is a wrongful death case arising out of the death of Joyce Weeks at Myrtle Lake Resort. Joyce Weeks and her husband Samuel began managing the Myrtle Lake Resort in 2014. In 2016 Joyce Weeks died from injuries sustained in a fall down outdoor cement stairs leading from the main cabin at the defendant resort. The cause of the fall was uncertain.

Samuel did not see Joyce fall down the stairs and does not know if she had begun using the stairs when she fell. The outdoor stairs are cement with steps going down two opposite sides. One side is longer and points to the lake, while the other has only four steps. Samuel stated that he and his wife almost always used the short side of the stairs because of the condition of the other stairs. Joyce fell down the long side of the stairs. Samuel also noted that Joyce had knee replacement surgery six to eight months before her fall. No one saw her fall, however, and it was not clear whether she had started using the stairs at the time of her fall.

Constructed in 1960 or1961, the steps were original to the resort. Staub's expert concluded that the steps could not be repaired as a practical matter, and that at a cost of less than $800 they could have been removed and replaced with all-weather wood steps with a guard rail. The opposing expert concluded that the steps were serviceable.

The district court dismissed the case on a motion for summary judgment for lack of sufficient proof of causation. Staub appealed, arguing that there was a material dispute as to the facts on the causation issue. The court of appeals affirmed.

The court noted that a prima facie case of cause-in-fact may be established by circumstantial evidence, but that it cannot be based on speculation and conjecture. *Id.* at *3. Staub is arguing for a broader rule in the Minnesota Supreme Court. The argument is essentially that when the evidence establishes that a defendant's negligent act has "a strong propensity to cause the type of injury that ensued, that very causal tendency is evidence enough to establish a *prima facie* case of cause-in-fact." Petition for Further Review of the Court of Appeals, at 4, quoting *Liriano v. Hobart Co.*, 170 F.3d 264, 271–72 (2d Cir. 1999). There are other formulations of the theory, but if the plaintiffs' theory is accepted, nothing would change in the way juries are instructed. The jury would still be instructed in direct and circumstances evidence (CIVJIG 12.10) and direct cause (CIVJIG 27.10). It would be a question of law for the district court to determine if the "strong propensity" standard is met. If the standard is met, the case goes to the jury.

CATEGORY 28

COMPARATIVE FAULT, DEFENSES, AND JOINT AND SEVERAL LIABILITY

CIVJIG 28.15

COMPARATIVE FAULT

Replace item 7 with the following:

[7. Liability for injury caused by an animal with a vicious or dangerous propensity known by the owner of the animal.]

CIVJIG 28.30

PRIMARY ASSUMPTION OF RISK

USE NOTE

Substitute this Use Note for the current Use Note:

Primary assumption of risk is not an affirmative defense that is subject to comparison under the Minnesota Comparative Fault Act, M.S.A. § 604.01, subd. 1a (" 'Fault' includes . . . unreasonable assumption of risk not constituting an express consent or primary assumption of risk."). Rather, it relates to the issue of whether the defendant owes a duty to the plaintiff. If there are fact questions concerning the application of primary assumption of risk, such as whether the plaintiff knew of and appreciated the risk of injury and voluntarily encountered the risk, those fact questions may be the subject of appropriate special verdict questions. If the issue is whether the plaintiff assumed an inherent risk in a particular sporting activity, that issue could be submitted to the jury pursuant to an appropriate special verdict question. A suggested jury instruction covering primary assumption of risk in sporting events is set out in the Authorities. The supreme court made clear its intent to limit the reach of implied primary assumption of risk in *Soderberg v. Anderson*, 922 N.W.2d 200 (Minn. 2019), and *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185 (Minn. 2019).

AUTHORITIES

Substitute the following for the current Authorities:

In *Springrose v. Willmore*, 292 Minn. 23, 24–25, 192 N.W.2d 826, 827 (1971), the court was required to consider the differences between secondary and primary assumption of risk because of the adoption of the comparative negligence statute:

> Assumption of risk has been conceptually distinguished according to its primary or secondary character. Primary assumption of risk, express or implied, relates to the initial issue of whether a defendant was negligent at all-that is, whether the defendant had any duty to protect the plaintiff from a risk of harm. It is not, therefore, an affirmative defense. The limited duties owed licensees upon another's property, *e.g., Sandstrom v. AAD Temple Bldg. Assn., Inc.*, 267 Minn. 407, 127 N.W.2d 173 (1964), or patrons of inherently dangerous sporting events, *e.g., Aldes v. St. Paul Ball Club*, 251 Minn. 440, 88 N.W.2d 94 (1958), are illustrative. The classes of cases involving an implied primary assumption of risk are not many and, because this is not such a case, we have no occa-

sion to determine the method by which such issue should be presented to a jury.

Secondary assumption of risk, as an affirmative defense to be proved by a causally negligent defendant, is the principal issue for our determination now. The doctrine of implied assumption of risk must, in our view, be recast as an aspect of contributory negligence, meaning that the plaintiff's assumption of risk must be not only voluntary but, under all the circumstances, unreasonable. Instruction 135, Minnesota Jury Instruction Guides, remains an appropriate definition of assumption of risk, but Instruction 136 is to be abandoned. The practical and most important impact of this decision is to mandate that, like any other form of contributory negligence, assumption of risk must be apportioned under our comparative negligence statute, Minn. St. 604.01, subd. 1.

The application of the doctrine of implied primary assumption of risk has been inconsistent since *Springrose*, but the Minnesota Supreme Court has consistently confined the doctrine.

In *Soderberg v. Anderson*, 922 N.W.2d 200 (Minn. 2019), a skiing accident case, and *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185 (Minn. 2019), an innkeeper's liability/dram shop case, the supreme court made clear its intent to restrict the scope of primary assumption of risk.

Henson arose out of the death of an off-duty bar employee who slipped and hit his head on the sidewalk while aiding the bar manager in escorting an intoxicated and disruptive patron from a bar. The court declined to extend the doctrine of implied primary assumption of risk to bar a claim based on the patronage and operation of a bar. *Soderberg* involved a skiing accident in which the plaintiff, a ski instructor who was conducting a ski lesson for a child on an easy hill, was hit by Anderson, a snowboarder who was performing an aerial trick. In *Henson*, the supreme court noted the trend of its decisions has been to limit the reach of implied primary assumption of risk:

In recent years we have been invited to extend implied primary assumption of risk to new areas and have declined to do so. See, e.g., Daly, 812 N.W.2d at 120–21 (declining to relieve the defendant of his duty to operate his snowmobile reasonably by extending the doctrine to recreational snowmobiling). And today we have declined to extend the doctrine to recreational downhill skiing and snowboarding. Soderberg v. Anderson, 922 N.W.2d 200, 205 (Minn. Jan. 23, 2019).

We see no good reason to extend the doctrine to preclude liability for injuries arising out of the operation and patronage of bars. Although the service and consumption of alcohol can most certainly

> lead to incidents such as the one here, we have never considered operating and patronizing bars to be inherently dangerous activities. The operation and patronage of bars is not—and should not be—a contact sport. To the contrary, our precedent is clear that bar owners, as do all innkeepers, have a duty of care. As we have said, "Tavern owners in Minnesota have the duty to exercise reasonable care under the circumstances to protect their patrons from injury." Alholm v. Wilt, 394 N.W.2d 488, 490 (Minn. 1986); see also, e.g., Swanson v. Dugout, Inc., 256 Minn. 371, 98 N.W.2d 213, 215 (1959) (explaining the duty of an "operator of an establishment where beer and liquor are sold"); Priewe v. Bartz, 249 Minn. 488, 83 N.W.2d 116, 119 (1957) (expressing "no doubt" that a tavern operator "owed a duty to those coming upon his premises"); Windorski v. Doyle, 219 Minn. 402, 18 N.W.2d 142, 145 (1945) (stating the "general" rule that a bar owner "was required to use reasonable care to protect its guests and patrons"). That is not to say that a bar owner's liability is unlimited; the four well-established elements of innkeeper negligence—especially foreseeability—sufficiently mark the duty of innkeepers to prevent injuries.

922 N.W.2d at 191.

In *Soderberg* the court was asked to extend the doctrine of implied primary assumption of risk to a skiing accident. The court declined for three reasons. First, the court was not convinced that the risks involved in recreational skiing were the same sort of inherent risks that exist in the activities to which the court has applied implied primary assumption of risk. Second, while the court did not overturn its previous precedent, it was "loathe to extend the doctrine of implied primary assumption to yet another activity" because it is disfavored in Minnesota law. Third, there was no evidence in the record suggesting that failure to apply the doctrine to recreational skiing would deter Minnesotans from skiing nor was there evidence that ski operators would be adversely affected. *Id.* at 205–06.

The court recognized its application of primary assumption to specific situations: (1) *Wells v. Minneapolis Baseball & Athletic Ass'n*, 122 Minn. 327, 142 N.W. 706 (1913) (spectator at baseball game injured by fly ball); (2) *Grisim v. TapeMark Charity Pro-Am Golf Tournament*, 415 N.W.2d 874 (Minn. 1987) (golf tournament spectator hit by flying golf ball); (3) *Modec v. City of Eveleth*, 224 Minn. 556, 29 N.W.2d 453, 456–57 (1947) (player and spectator risks involved in hockey); *Moe v. Steenberg*, 275 Minn. 448, 147 N.W.2d 587 (1966) (figure skating collisions); *Wagner v. Thomas J. Obert Enterprises*, 396 N.W.2d 223 (Minn. 1986) (roller skating, but not risks of negligent maintenance and supervision of a skating rink).

The court declined to overrule its precedent and abolish the doc-

trine of implied primary assumption of risk in its entirety, but also declined to further extend it to skiing.

Taken together, *Henson* and *Soderberg* make clear the supreme court's intent to limit the scope of implied primary assumption of risk. The decisions necessarily constitute an implicit overruling of some of the applications of implied primary assumption of risk by the Minnesota Court of Appeals. *See, e.g.*, *Schneider ex rel. Schneider v. Erickson*, 654 N.W.2d 144 (Minn. Ct. App. 2002) (paintball); *Goodwin v. Legionville School Safety Patrol Training Center, Inc.*, 422 N.W.2d 46 (Minn. Ct. App. 1988) (injuries sustained by experienced roofer in a fall); *Snilsberg v. Lake Washington Club*, 614 N.W.2d 738 (Minn. Ct. App. 2000) (diving off dock); *Jussila v. U.S. Snowmobile Ass'n*, 556 N.W.2d 234 (Minn. Ct. App. 1996) (injury to spectator at snowmobile race); *Andren v. White-Rodgers Co., a Div. of Emerson Elec. Co.*, 462 N.W.2d 860 (Minn. Ct. App. 1990) (space heater explosion).

If primary assumption of the risk is submitted to the jury in the narrow range of cases involving inherently dangerous sporting events, a suggested instruction is as follows:

> A person who is involved in (name of activity) assumes the risks inherent in that activity. You must decide whether (plaintiff's) (injury) (accident) arose out one of those inherent risks.

The instruction tracks the supreme court's opinion in *Wagner v. Thomas J. Obert Enterprises*, 396 N.W.2d 223, 226 (Minn. 1986).

If the instruction is given, the correlative special verdict question should ask, "Did plaintiff assume an inherent risk of (name of activity) in (her) (his) accident of ___?" The jury should then be instructed to answer the breach of duty question only if it answered "no" to this question.

DIVISION C

VICARIOUS LIABILITY AND IMPUTED FAULT

CATEGORY 30

VICARIOUS LIABILITY—BUSINESS ENTITIES

INTRODUCTORY NOTE

Add to Introductory Note on p. 262 of Main Volume, after Independent Contractors:

In *Soto v. Shealey*, 331 F. Supp. 3d 879 (D. Minn. 2018), the United States District Court for the District of Minnesota concluded that negligent selection of an independent contractor was a cause of action that the Minnesota Supreme Court would recognize, for four reasons. The court saw negligent selection as an analogue to the tort of negligent hiring in employer-employee relationships, a tort adopted by the Minnesota Supreme Court and the basis for the supreme court's adoption of the related tort of negligent credentialing in *Larson v. Wasemiller*, 738 N.W.2d 300, 306 (Minn. 2007). Second, the court noted that the tort has been adopted by an overwhelming majority of the states. Third, adoption of the rule would not create tension with other laws. Given the significant number of exceptions to the general rule that an employer is not liable for the actions of independent contractors, the no duty rule now is effectively a preamble to the list of exceptions. Finally, the court noted that it is consistent with the Restatement (Second) of Torts position on the issue:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons.

Restatement (Second) of Torts § 411 (Am. Law Inst. 1965).

Add the following to the end of the Introductory Note:

Vicarious Liability and Government Employees. Minn. Stat. § 3.736, subd. 1 provides that "[t]he state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment . . . ." Minn. Stat. § 3.732, subd. 1(3) defines "scope of office or employment to mean "that the employee was acting on behalf of the state in the performance of duties or tasks lawfully assigned by competent authority."

Minn. Stat. § 466.02 provides that, "[s]ubject to the limitations of sections 466.01 to 466.15, every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function." Minn. Stat. § 466.03, 15, excludes "[a]ny claim against a municipality, if the same claim would be excluded under section 3.736, if brought against the state."

In *Doe 175 v. Columbia Heights School District ISD No. 13*, 873 N.W.2d 352 (Minn. Ct. App. 2016), the court of appeals held that the limitation on liability in the State Tort Claims Act also applied to a claim against a school district based on an inappropriate relationship between a student and school district employee. Because there was no dispute in the case that the employee engaged in the sexual misconduct "for his own personal reasons, rather than " 'on behalf of' the school district 'in the performance of duties or tasks lawfully assigned by competent authority,' "the court held that the school district was not vicariously liable for the employee's actions. *Id.* at 358.

Personal Liability – Corporate Officers

While Minnesota recognizes vicarious liability, it does not recognize "reverse-vicarious liability," which means that a corporate officer may not be held personally liable for a company's torts by virtue of the officer's job title, *see DeRosa v. McKenzie*, 936 N.W.2d 342, 346 (Minn. 2019) (defamation), but the officer can be held liable in some cases, including where the officer has actually participated in the torts of the corporation. In *DeRosa* the supreme court held that a corporate officer could be personally liable for defamation when he did not author the defamatory statement but participated in its publication. The court also noted that it has recognized that "actions other than authoring a defamatory statement may constitute taking part in the commission of the tort." *Id.* As examples, the court noted *Frankson v. Design Space Int'l*, 394 N.W.2d 140, 144 (Minn. 1986), which held that the intra-corporate preparation and distribution of a defamatory termination letter to a

personnel file satisfied the publication element of a defamation claim, and *McKenzie v. Wm. J. Burns Int'l Detective Agency*, 149 Minn. 311, 183 N.W. 516, 517 (1921), holding that in-house statements satisfied the public element, although they were subject to a privilege. In *Ellingson v. World Amusement Serv. Ass'n*, 175 Minn. 563, 572, 222 N.W. 335, 339 (1928), the supreme court recognized the "universal rule that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable" for that tort. In *Morgan v. Eaton's Dude Ranch*, 307 Minn. 280, 283, 239 N.W.2d 761, 762 (1976), the supreme court stated that "It is settled that a corporate officer is not liable for the torts of the corporation's employees unless he participated in, directed, or was negligent in failing to learn of and prevent the tort." *See also Ransom v. VFS, Inc.*, 918 F.Supp.2d 888, 894 (D. Minn. 2013).

CIVJIG 30.10

DEFINITION—INDEPENDENT CONTRACTOR—EMPLOYEE

AUTHORITIES

Add to end of Authorities:

In *Abel v. Abbott Northwestern Hospital*, 947 N.W.2d 58 (Minn. 2020), the supreme court applied a liberal definition of "employee" when applying the Minnesota Human Rights Act (MHRA) to a claim of alleged employment discrimination. Meagan Abel, an Asian Indian doctoral student in St. Mary's psychology program, was required as part of the program to complete a certain number of practicum hours. Accordingly, she applied for placement in and was admitted to Allina's clinical psychology program at Abbott Northwestern Hospital. The practicum commenced in September of 2015. The practicum was supervised by Dr. Jeffrey Gottlieb, a clinical psychologist and Abbott's practicum training director. Based on allegations of inappropriate conduct, Dr. Gottlieb was removed as training director by Allina on December 23, 2015, and he was given a no-contact order with students.

Abel filed charges of race-based and sex-based discrimination in employment with the Minnesota Department of Human Rights in May of 2017. She alleged discriminatory behavior based on race and sex by Dr. Gottlieb and the failure of St. Mary's and Allina to deal with it appropriately. Abel then brought a civil suit against Allina in March of 2018 alleging discrimination in employment, education, and public accommodation. She also alleged negligence. In a separate complaint against St. Mary's she alleged discrimination in education and public accommodation and negligence.

The district court dismissed the discrimination claims, holding that the statute of limitations had run. The negligence claims were dismissed on the basis that the defendants did not owe a duty to the plaintiff. The court of appeals affirmed.

In a divided opinion, the supreme court affirmed in part and reversed in part, holding that Abel stated a claim for employment discrimination against St. Mary's, that the statute of limitations had not run on that claim, and that the defendants owed a common law duty to Abel.

The court held that Abel stated a claim for employment discrimination because she was an "employee" within the meaning of the MHRA, even though she was not compensated for her work in the practicum.

Minn. Stat. § 363.08, subd. 2(3) provides that discrimination "against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment" is an unfair employment practice. None of the statutory exemptions from the MHRA noted in Minn. Stat. §§ 363A.20–363A.26 applied to unpaid practicum students. The issue of whether an unpaid practicum student could recover under the MHRA was a case of first impression.

The supreme court held that compensation is a typical but not essential requirement in establishing an employment relationship. *Id.* at 75. The court initially noted the position of the Commissioner of the Department of Human Rights urging the court to reject a test for employment focused on compensation in favor of a more holistic approach to the issue. *Id.* at 74 n.7. While recognizing that the Commissioner's position is not binding, the court viewed the position as consistent with its conclusion that the plain terms of the MHRA do not require compensation as a necessary element in establishing an employment relationship. *Id.* at 75-76. The court held that the application of common law agency principles alone is inconsistent with the more liberal construction that the court affords to the MHRA. *Id.* at 76. Instead, the court found "Title VII's hybrid test" to be "the more appropriate approach". *Id.* "Under the hybrid test, the existence of an employment relationship 'is construed in light of general common-law concepts, taking into account the economic realities of the situation." *Id.* (quoting *Wilde v. Cty. of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994)). As a "totality-of-the-circumstances analysis, no single factor is dispositive." *Id.*

CATEGORY 32

IMPUTED FAULT—MOTOR VEHICLE

CIVJIG 32.15

MOTOR VEHICLE OWNER—STATUTORY IMPUTATION OF LIABILITY—CONSENT—ADULT

Substitute this instruction, Use Note, and Authorities for the instruction, Use Note, and Authorities in the Main Volume.

Consent to the initial use of the vehicle

You must decide whether *(owner)* gave permission to *(driver)* for the initial use of the vehicle. You must consider all the circumstances, including:

1. Any discussions about the driver's permission to use the vehicle;

2. The relationship between the owner and the driver;

3. The fact that the driver used the vehicle, or frequently used the vehicle in the past;

4. Whether the owner objected to the driver using the vehicle in the past, or using it in the future;

5. [Additional factors].

The burden of proof is on (owner) to prove that they did not give permission to (driver) for the initial use of the motor vehicle.

Once an owner gives initial permission to a driver to use a vehicle, any later use by that driver remains permitted even though the owner did not agree to the use and the driver goes

beyond the scope of the initial grant of permission.

USE NOTE

In a case involving consent for a minor to drive, the consent issue should not be submitted to the jury absent a strong showing made by the party challenging consent. If there is a question concerning revocation of permission, CIVJIG 43.16 should be given after this instruction.

This instruction is intended for use in cases in which there is a dispute whether the owner gave initial permission for use of the vehicle. For cases in which there is a question about revocation of permission, use CIVJIG 32.16.

The burden of proof is on the owner to prove lack of consent.

AUTHORITIES

M.S.A. § 169.09, subd. 5a, provides that "[w]henever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof."

The purpose of this statute is to make owners of motor vehicles liable to persons injured by operation of the vehicle where liability would not otherwise exist. *See Milbank Mut. Ins. Co. v. United States Fidelity & Guaranty Co.*, 332 N.W.2d 160, 165 (Minn. 1983); *Holmes v. Lilygren Motor Co.*, 201 Minn. 44, 48, 275 N.W. 416, 418 (1937). The statute is aimed at imposing liability on those who are owners and have the power and right to prevent the use of the vehicle. *See Frye v. Anderson*, 248 Minn. 478, 492, 80 N.W.2d 593, 602 (1957).

Under the statute, elements that must be established include: (1) that the alleged owner was in fact the owner, as that term is interpreted under the statute, (2) that use of the motor vehicle was with the express or implied consent of the owner, and (3) that the driver's negligent operation or use of the vehicle caused the damage complained of. *See Frye v. Anderson*, 248 Minn. 478, 492, 80 N.W.2d 593, 602 (1957).

Proof of ownership may involve more than merely proof of registered title to the automobile. *See Frye v. Anderson*, 248 Minn. 478, 487–89, 80 N.W.2d 593, 602 (1957); *Flaugh v. Egan Chevrolet*, 202 Minn. 615, 617, 279 N.W. 582, 584 (1938). Evidence is admissible to show that title is different from that appearing on the registration. *See Arneson v. Integrity Mut. Ins. Co.*, 344 N.W.2d 617, 619 (Minn. 1984); *Welle v. Prozinski*, 258 N.W.2d 912, 916 (Minn. 1977).

Proof of ownership of the automobile establishes a prima facie case that it is being operated upon a public highway with express or implied consent of the owner at the time of the accident. *Carey v. Broadway Motors, Inc.*, 253 Minn. 333, 337, 91 N.W.2d 753, 756 (1958). The statutory inference of permission to operate the vehicle does not relieve the claimant of the burden of proving that the vehicle was being used with the permission of the owner at the time and place of the accident. *See Newcomb v. Meiss*, 263 Minn. 315, 325–26, 116 N.W.2d 593, 600 (1962).

Consent must be determined like any other fact. *See Koski v. Muccilli*, 201 Minn. 549, 551, 277 N.W. 229, 230 (1938). Implied consent of the owner of a vehicle to its operation by another may be drawn from all facts and circumstances of the case. *Beebe v. Kleidon*, 242 Minn. 521, 525, 65 N.W.2d 614, 616 (1954). Previous use of a car with express consent cannot be construed as evidence of implied consent at a subsequent time. *See Kayser v. Jungbauer*, 217 Minn. 140, 143–144, 14 N.W.2d 337, 339 (1944).

The burden of proof is on the owner to prove lack of consent. *See Mutual Service Casualty Insurance Co. v. Lumbermen's Mutual Casualty Co.*, 287 N.W.2d 385, 386 (Minn. 1979) ("[t]he burden of proving lack of consent is upon the named insured and requires a strong showing that the automobile was being used without the owner's knowledge and contrary to is explicit instructions") (quoting *Shuck v. Means*, 302 Minn. 93, 226 N.W.2d 285 (1975); *Progressive Direct Insurance Co. v. Namarra, No. A20-0655*, 2021 WL 1522483, at * 6 (Minn. Ct. App. Apr. 19, 2021).

A provision in a written agreement between a garage and one to whom it loans an automobile prohibiting use by another is ineffective unless the borrower is aware of the prohibition. *See Taylor v. Allstate Ins. Co.*, 286 Minn. 449, 455, 176 N.W.2d 266, 270 (1970).

SPECIAL VERDICT FORMS

CIVSVF 32.90

PERMISSION TO USE A MOTOR VEHICLE

Substitute this special verdict question for Question #1 in the instruction in the Main Volume:

1. Did (name of driver) use the (name of owner's) motor vehicle at the time of the (date) accident without (name of owner's) permission?

Replace item 2 with the following:

2. Had (name of person) (converted)(stolen) (name of motor vehicle owner's) motor vehicle at the time of the (date) accident.

USE NOTE

Add to end of Use Note (before the special verdict questions):

The person claiming the vehicle was used without their permission has the burden of proof on the permission issue.

PART III

TOPICAL AREAS OF LAW

Table of Categories

CATEGORY 38

ANIMAL LAW—INURIES CAUSED BY ANIMALS

CIVSVF 38.92

NEGLIGENCE AND M.S.A. § 347.22—TWO DEFENDANTS

Replace Question 9 with the following:

9. *If your answer to Question 8 was "Yes," then answer this Question:* Was this negligence by (plaintiff) a direct cause of the injuries sustained by (plaintiff)?

CATEGORY 40

BUSINESS TORTS—UNFAIR COMPETITION

CIVJIG 40.15

PRODUCT OR SERVICES DISPARAGEMENT

Change the title to add "Services":

[Retitled]

AUTHORITIES

Add to end of Authorities:

Jeffrey C. Brown PLLC v. Gold Star Taxi and Transportation Service Corp., No. A19-1812, 2020 WL 4743502 (Minn. Ct. App. Aug. 17, 2020), arose out of a negative review posted by the Jeffrey C. Brown, PLLC Google My Business website listing by Nabil Ali, the chief executive officer of Gold Star Taxi and Transportation corporation following a case before Brown, an attorney and part-time conciliation court officer. The review of Brown was a one-star review, along with the statement, "Need to go back to law school."

Brown brought suit on behalf of himself and his law firm, alleging that the statement was defamatory and that it violated the Uniform Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43–.48 (2018). The court rejected the defamation claim, holding that the posting was an opinion. The court also rejected the deceptive trade practices claim.

Section 325D.44, subd. 1(8) provides that "A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person . . . disparages the goods, services, or business of another by false or misleading representation of fact[.]"

The court of appeals rejected the claim for three reasons. First, the court concluded that Brown was unable to prove a "false or misleading representation of fact" because it was an opinion, not a statement of fact. Second, the court held that the statement was not made in the "course of business" because there was no business relationship between Ali and Brown. Ali had only appeared before Brown in Brown's

capacity as a court referee. Third, Minn. Stat. § 325D.45, subd. 1 requires an allegation that the claimant is "likely to be damaged" because of a deceptive trade practice. That requires an allegation of facts that demonstrate a risk of future harm. 2020 WL 4743502, at *4, citing *Nelson v. Am. Family Mut. Ins. Co.*, 262 F. Supp. 3d 835, 862 (D. Minn. 2017). Brown did not offer facts showing any risk of future harm. Ali removed the post from the website and stated in an affidavit that Gold Star would not post any similar negative review in the future. *Id.*

CIVJIG 40.30

INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS

AUTHORITIES

Add the following to Authorities in Volume 4, p 367, "4. The Defendant's Actions Were Not Justified", before the second to the last paragraph:

In *Sysdyne Corp. v. Rousslang*, 860 N.W.2d 347 (Minn. 2015), the supreme court held that honest reliance on the advice of outside counsel with respect to a noncompete agreement an employee signed with a previous employer barred a claim for intentional interference with contract by the former employer.

The court reiterated the five elements of a claim for tortious interference with contract:

> (1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages." *Furlev Sales & Assocs., Inc., v. N. Am. Auto. Warehouse, Inc.*, 325 N.W.2d 20, 25 (Minn.1982). The sole element at issue in this case is the fourth element, "without justification." Whether the interference is justified is normally a question of fact. *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn.1994). "[T]he test is what is reasonable conduct under the circumstances." *Id.*

The defendant has the burden of proving that the interference was justified. 860 N.W.2d at 347, 351, citing *Royal Realty Co. v. Levin*, 244 Minn. 288, 295, 69 N.W.2d 667, 673 (1955).

In *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994), the court stated that "[t]here is no wrongful interference with a contract where one asserts 'in good faith a legally protected interest of his own,' " quoting Restatement (Second) of Torts § 773 (1979), but the issue of whether interference is justified is a fact issue. The test for that determination is "what is reasonable conduct under the circumstances." *Id.* at 588.

Noting that it had never rejected the possibility that reliance on the advice of outside counsel could constitute a basis for a finding of justification, the court in *Sysdyne* concluded that "[a] per se rule precluding reliance on the advice of counsel from justifying a party's interference with a contract would be inconsistent with our fact-based, case-by-case approach." 860 N.W.2d at 352.

CIVJIG 40.40

JUSTIFICATION

Replace "[The Committee recommends no instruction.]" with "[No recommended instruction].

AUTHORITIES

Add the following at the end of "4. Advancing Business Interests" at p. 376 of the main volume:

The supreme court considered justification based on advice of counsel in *Sysdyne Corp. v. Rousslang, et al.*, 860 N.W.2d 347 (Minn. 2015). Xigent Solutions hired a former employee of Sysdyne. Sysdyne sued the former employee for breach of his covenant not to compete and sued Xigent for tortious interference with contract. Xigent contended that any interference on its part was justified based on advice from outside counsel that the agreement was unenforceable. The trial court held the non-compete was enforceable, but ruled that Xigent's actions were justified because it honestly, though mistakenly, believed that the agreement was unenforceable. The supreme court declined to adopt a rule that reasonable reliance on the advice of counsel could not form the basis for justification. The supreme court stated, "A per se rule precluding reliance on the advice of counsel from justifying a party's interference with a contract would be inconsistent with our fact-based, case-by-case approach." *Sysdyne*, 860 N.W.2d at 352.

CATEGORY 45

CIVIL DAMAGE ACT

INTRODUCTORY NOTE

Comparative Fault and Complicity

Add the following to the end of the Comparative Fault and Complicity section of the Introductory Note in Volume 4, p. 387:

Cases involving claims against bars based on intentional injuries caused by a bar patron are typically brought under the Civil Damage Act and/or innkeeper's liability theory. While the injured person need not be a bar patron to sue under the Civil Damage Act, the plaintiff must be a bar patron to sue under an innkeeper's liability theory.

Comparative fault principles apply to claims under an innkeeper's liability theory. They also apply under the Civil Damage Act, Minn. Stat. § 340A.801, subd. 3, which provides that "Actions under this section are governed by section 604.01." Comparative fault principles therefore also apply to Civil Damage Act claims as well as negligence claims based on an innkeeper's liability theory. Notwithstanding the general application of comparative fault principles in those cases, comparative fault issues arise in cases where a person is injured by the intentional actions of another and the injured person sues the bar and the person who committed the intentional tort. The injured person may sue under the Civil Damage Act if the allegation is that the bar's illegal sale of alcohol to the assailant was the proximate cause of the assailant's intoxication and that the assailant's intoxication was a proximate cause of the injury. *See Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 372–75 (Minn. 2008) (illegal sale must be a proximate cause of the intoxication and the intoxication must be a substantial factor in causing the injury). The injured person may also have a claim against the bar under an innkeeper's liability theory. *See, e.g.*, *Alholm v. Wilt*, 394 N.W.2d 488 (Minn. 1986) (bar must have knowledge of assailant's dangerous tendency and fail to use reasonable care to prevent a foreseeable injury). Proof of an illegal sale of alcohol is unnecessary in an innkeeper's liability theory.

There are several basic principles that apply in determining how fault should be allocated in these cases. First, while the Comparative

Fault Act provides for the comparison of liability based on negligence, it does *not* provide for the comparison of liability based on an intentional tort. Minn. Stat. § 604.01, subd. 1a defines "fault" to include

> acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801.

See ADT Security Services, Inc. v. Swenson, 687 F. Supp. 2d 884 (D. Minn. 2009), which arose out of the shooting death of a home resident at the hands of her ex-boyfriend, who gained entry to her house because of a defect in the alarm system. Although questioning whether fault could be compared between negligent and intentional tortfeasors, the court found it unnecessary to decide the issue, concluding instead that the Minnesota courts would apply section 14 of the Restatement (Third) of Torts: Apportionment of Liab. (Am. Law Inst. 2000), and impute the fault of the intentional wrongdoer to a negligent defendant whose fault consisted of the failure to guard against that intentional misconduct.

Second, In *Florenzano v. Olson*, 387 N.W.2d 168, 175 (Minn. 1986), the supreme court stated that "[w]ithout question, principles of comparative negligence would not apply to an intentional tort; we have never so applied them." The court effectively accepted the Wisconsin Supreme Court's position that contributory negligence is not a defense to an intentional tort. *Id.* at 175 n. 6 (citing *Schulze v. Kleeber*, 10 Wis.2d at 545, 103 N.W.2d 560, 564 (Wis. 1960)). *See also State v. Riggs*, 865 N.W.2d 679, 686 n. 8 (Minn. 2015) (contributory negligence not a defense to an intentional tort).

Third, the negligence of an intoxicated decedent cannot be imputed to persons seeking recovery under the Civil Damage Act for loss of means of support against a bar that illegally served alcohol to the decedent, *see Bushland v. Corner Pocket Billiard Lounge of Moorehead, Inc.*, 462 N.W.2d 615 (Minn. Ct. App. 1990) (noting that the bar is in effect strictly liable for those damages). Nothing appears to prevent the assertion of contributory negligence against a person seeking to recover against a bar under the Civil Damages Act for injuries caused by an intoxicated person.

Fourth, if the plaintiff sues the bar under an innkeeper's liability theory for intentional injuries caused by another person (even if the bar did not illegally serve that person alcohol), the bar is entitled to assert the plaintiff's negligence as a defense to the innkeeper's liability (negligence) claim. *See Lincoln v. Cambridge Radisson Co.*, 235 Minn.

20, 49 N.W.2d 1 (1951) (contributory negligence in slip-and-fall a permissible defense, even though not established by the evidence).

Based upon these principles, the special verdict forms assume that contributory negligence is not a defense to an intentional tort claim, but may be a defense to Civil Damages Act and innkeeper's liability claims. If so, fault may be apportioned between the injured person and the bar, but not the injured person and intentional wrongdoer.

Fifth, an intentional wrongdoer held liable for battery is prohibited from seeking contribution from other joint tortfeasors. *See Farmer's Ins. Exch. v. Village of Hewitt*, 274 Minn. 246, 255, 143 N.W.2d 230, 236 (1966); *Kemerer v. State Farm Mut. Auto. Ins. Co.*, 201 Minn. 239, 242, 276 N.W. 228, 230 (1937); *Oelschlager v. Magnuson*, 528 N.W.2d 895, 899 (Minn. Ct. App. 1995). A bar that is held liable under the Civil Damage Act and/or innkeeper's liability theory would likely not have an indemnity claim against D, *see Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 372, 104 N.W.2d 843, 848 (1960) (listing indemnity categories); Restatement (Third) of Torts: Apportionment Liab. (Am. Law Inst. 2000), but would have a contribution claim against the intentional wrongdoer.

The following three examples illustrate the impact of these basic principles.

First, assume P sues ABC Bar under a Civil Damage Act and/or innkeeper's liability theory, and the jury finds ABC Bar liable under one or both of those theories, and that D is found to have committed a battery on P, and that the jury apportioned fault as follows:

P (30%) v. ABC Bar (70%)

P, is entitled to recover 70 percent of his or her damages against ABC Bar. The fault of D, the intentional wrongdoer, is not compared, but D is jointly and several liability for all of P's damages, without regard to P's percentage of fault, because contributory negligence is not a defense to an intentional tort. Pursuant to Minn. Stat. § 604.02, subd. 1(3), the intentional tortfeasor is jointly and severally to P for the whole award of damages.

Second, assume P sues ABC Bar under a Civil Damage Act and/or innkeeper's liability theory, and the jury finds ABC Bar liable under one or both of those theories, and that D is found to have committed a battery on P, and that the jury apportioned fault as follows:

P (60%) v. ABC Bar (40%)

P is not entitled to recover from ABC Bar because P's fault is

greater than ABC Bar's. P is entitled to recover from D, who is jointly and severally liable to P for the whole damages award, pursuant to Minn. Stat. § 604.02, subd. 1(3). Under no circumstances does D have a contribution claim against ABC Bar. ABC Bar will not have an indemnity claim against D, but may have a contribution claim.

Third, assume P sues ABC Bar under a Civil Damage Act and/or innkeeper's liability theory, and the jury finds ABC Bar liable under one or both of those theories, and that D is found to have committed a battery on P, and that the jury apportioned fault as follows:

P (0%) v. ABC Bar (100%)

P is entitled to recover 100 percent of his damages from ABC Bar. P is also entitled to recover from D. *See Gronquist v. Olson*, 242 Minn. 119, 126, 64 N.W.2d 159, 164 (1954).

CIVJIG 45.30

CAUSATION

Substitute this Use Note for the current Use Note:

USE NOTE

In *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 373 (Minn. 2008), the supreme court held that for intoxication to be a "proximate cause" of the injury or loss in Civil Damage Act cases it must have been a "substantial factor" in bringing about the injury. To satisfy the requirement, the same causation standard used in negligence cases (CIVJIG 27.10) is applicable in Civil Damage Act cases. CIVJIG 27.10 also applies to determine whether the intoxication was a cause of the accident or injury in question. As in other cases involving causation issues, the court may determine as a matter of law that a particular injury or accident was not proximately caused by an illegal sale. In *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 193 (Minn. 2019), the court, citing *Osborne*, stated that " '[w]hether proximate cause exists in a particular case is a question of fact for the jury to decide.' . . . This case is not the rare exception to that general rule."

Substitute the following for the current Authorities:

AUTHORITIES

In *Kryzer v. Champlin American Legion No. 600*, 494 N.W.2d 35 (Minn. 1992), the supreme court considered the standard for determining causation in Civil Damage Act cases. The court of appeals in *Kryzer* adopted a "but for" standard for purposes of determining whether a sufficient causal connection is established between a person's intoxication and the injury caused. The supreme court rejected that standard, adhering to its previously stated standard:

> Forty years ago this court ruled that in order to establish liability pursuant to the civil damage act . . . the liquor illegally sold need not be the sole cause of intoxication, that it is enough if it be a "proximately contributing cause." . . . Thirty-seven years ago this court ruled that a claimant seeking recovery pursuant to the civil damage act must show that the defendant illegally sold intoxicating liquor which caused intoxication and "that such intoxication was the proximate cause of plaintiff's injuries." . . .
>
> Although we have not since had occasion to expressly require that the causal relationship be proximate, this court has never retreated from that requirement.

Kryzer v. Champlin American Legion No. 600, 494 N.W.2d at 36–37; *see also Kunza v. Pantze*, 531 N.W.2d 839 (Minn. 1995), reversing 527 N.W.2d 846 (Minn. Ct. App. 1995); *Weber v. Au*, 512 N.W.2d 348, 350 (Minn. Ct. App. 1994).

The illegal sale of the alcoholic beverage must have been either the sole, or the cooperating, concurring, or contributing cause of the intoxicated person's intoxication. *See Hollerich v. Good Thunder*, 340 N.W.2d 665, 668 (Minn. 1983); *Murphy v. Hennen*, 264 Minn. 457, 463, 119 N.W.2d 489, 493 (1963); *Hahn v. Ortonville*, 238 Minn. 428, 432, 57 N.W.2d 254, 258–59 (1953).

There must be a "practical and substantial relationship" between the illegal sale and intoxication in order to establish the necessary causal relationship between the illegal sale and the intoxication. *See Hollerich v. Good Thunder*, 340 N.W.2d 665, 668 (Minn. 1983); *Kvanli v. Village of Watson*, 272 Minn. 481, 484, 139 N.W.2d 275, 277 (1965).

Osborne v. Twin Town Bowl, Inc., 749 N.W.2d 367 (Minn. 2008) clarified the proximate cause test for determining whether intoxication is the cause of an injury, and also the proof necessary to establish proximate cause. The case arose out of the death of 24-year-old Michael Riley, who jumped from a bridge after being stopped for DWI by a Minnesota State Highway Patrol officer who arrested but did not handcuff Riley. His family and girlfriend brought suit against Twin Town Bowl under the Civil Damages Act, alleging that he was illegally served alcohol there, that the illegal sale led to his intoxication, and that his intoxication caused his death.

Twin Town Bowl argued in its first motion for summary judgment and failure to state a claim upon which relief could be granted that Riley's intoxication was not a proximate cause of his death. The district denied the motion on the basis that dismissal was premature because of incomplete discovery. Twin City Bowl renewed its motion for summary judgment after the completion of further discovery. The plaintiffs submitted an expert psychological report in the form of an unnotarized affidavit as part of their response to Twin Town Bowl's motion. The expert examined Riley's medical and drug history and interviewed Riley's family and friends. The report noted that Riley often experienced blackouts when drinking excessively and that Riley's family and friends told him that Riley exhibited personality changes when he was intoxicated. The personality changes included "increased energy, flamboyance, grandiosity, aggressiveness, impulsivity, and thrill-seeking." The expert's opinion was that Riley may have been in a blackout state at the time he jumped into the river and that had Riley been sober, he would never have attempted such an escape.

The district court granted Twin Town Bowl's motion for summary

judgment, concluding that there was "no evidence and no genuine issue of material fact on the causation issue." The court of appeals affirmed. The Minnesota Supreme Court reversed. The sole issue on appeal was whether there was a genuine issue of material fact as to "whether Riley's intoxication was a proximate cause of him jumping to his death into the Minnesota River." The Minnesota Supreme Court held that the evidence was sufficient to deny Twin Town's motion for summary judgment.

The supreme court held that intoxication has to be *a* proximate cause but not *the* proximate cause of the injury giving rise to the dram shop claim, and that given the well-known effects of intoxication, expert testimony is unnecessary to establish that intoxication was a proximate cause of an injury. The court held that for intoxication to be a proximate cause of an injury, it "must have been a substantial factor in bringing about the injury."

The supreme court reaffirmed *Osborne* in *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185 (Minn. 2019), a case involving the death of an off-duty employee of Uptown Drink who was fatally injured while attempting to help the bar manager escort a belligerent patron from the bar:

> As we said in *Osborne*, "[w]hether proximate cause exists in a particular case is a question of fact for the jury to decide." . . . This case is not the rare exception to that general rule. As in *Osborne*, there is sufficient evidence in the record for Henson's family's dram-shop claim to survive a motion for summary judgment.

Id. at 193.

SPECIAL VERDICT FORMS

CIVSVF 45.90

CIVIL DAMAGE ACT LIABILITY

Replace the existing special verdict form with the following:

1. Did (defendant bar) illegally sell an alcoholic beverage to (intoxicated person or person under 21)?

Yes or No_____

2. If your answer to Question 1 was "Yes," then answer this question: Did the illegal sale cause or contribute to the intoxication of (person receiving the alcoholic beverage)?

Yes or No_____

3. If your answer to Question 2 was "Yes," then answer this question: Was this negligence by (defendant) a direct cause of the (collision) (accident) (event)?

Yes or No_____

4. What amount of money will fairly compensate (plaintiff) for:

a.	Damage to means of support?	$____
b.	Pecuniary loss?	$____
c.	Property damage?	$____

USE NOTE

This verdict form assumes a single bar illegally selling alcohol to a person who is subsequently injured, and a claim for loss of means of support and pecuniary loss due to that person's injuries or death.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 45.10: Illegal Sale—General.

2. CIVJIG 27.10: Direct Cause.

3. CIVJIG 27.10: Direct Cause.

4. CIVJIG 45.15: Damages—Means of Support and Pecuniary

Loss.

CIVSVF 45.97

CIVIL DAMAGE ACT LIABILITY—BAR AND INTOXICATED PERSON (INTENTIONAL WRONGDOER) *[New]*

1. Did (defendant bar) illegally sell an alcoholic beverage to (name of defendant/ intentional wrongdoer)?

_____
Yes or No

2. *If your answer to Question 1 was "Yes,"* then answer this question: Did the illegal sale cause or contribute to the intoxication of (defendant/ intentional wrongdoer)?

_____
Yes or No

3. If *your answer to Question 2 was "Yes,"* then answer this question: Was the intoxication resulting from the illegal sale a direct cause of the (injury)?

_____
Yes or No

4. Was (plaintiff) negligent?

_____
Yes or No

5. *If your answer to Question 4 was "Yes,"* then answer this question: Was this negligence by (plaintiff) a direct cause of (his) (her) injury?

_____
Yes or No

[If you answered "Yes" to Question 3 and "Yes" to Question 5, then answer Question 6]

6. Taking all of the fault that contributed as a direct cause to (plaintiff's) injury, what percentage do you attribute to:

(Defendant bar) _____%

(Plaintiff) _____%

TOTAL 100%

7. Did (defendant/intentional wrongdoer) cause a harmful or offensive contact with (plaintiff)?

_____
Yes or No

8. *If your answer to Question 7 was "Yes,"* then answer this question: Did (defendant/ intentional wrongdoer) intend to cause this contact?

_____
Yes or No

9. *If your answer to Question 8 was "Yes,"* then answer this question: Was this contact a direct cause of (plaintiff's) injury?

_____
Yes or No

[You must answer Questions 10 and 11 regardless of your answers to any of the other questions.]

10. What amount of money will fairly and adequately compensate (plaintiff) for damages directly caused by the injury up to the time of this verdict for:

a.	Past pain, disability and emotional distress	$
b.	Past wage loss	$
c.	Past healthcare expenses	$
d.	Other past loss	$

11. What amount of money will fairly and adequately compensate (person under 21) for damages reasonably certain to occur in the future, directly caused by the (collision) (accident) (event) for:

a.	Future pain, disability and emotional distress	$
b.	Loss of future earning capacity	$
c.	Future healthcare expenses	$
d.	Other future loss	$

USE NOTE

This verdict form assumes a Civil Damage Act suit against a bar and a battery claim against a defendant, where the allegation is that the intoxication was a direct cause of the plaintiff's injury. Contributory negligence on the part of a plaintiff cannot be a defense to a claim based on an intentional tort. This instruction assumes that it can be a defense in a suit against the bar. The questions concerning the defendant's liability for battery come after the comparative fault question in order to avoid confusion. A finding that the individual defendant committed a battery would make that defendant jointly and severally liable for the plaintiff's damages, pursuant to Minn. Stat. § 604.02, subd. 1 (3).

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 45.10: Illegal Sale—General.

2. CIVJIG 27.10: Direct Cause.

3. CIVJIG 27.10: Direct Cause.

4. CIVJIG 25.10: Negligence.

5. CIVJIG 27.10: Direct Cause.

6. CIVJIG 28.15: Comparative Fault.

7. CIVJIG 60.25: Battery.

8. CIVJIG 60.25: Battery.

9. CIVJIG 27.10: Direct Cause.

10a. CIVJIG 91.10: Items of Personal Damage—Past Damage—Bodily and Mental Harm.

10b. CIVJIG 91.20: Items of Personal Damage—Past Damage—Loss of Earnings.

10c. CIVJIG 91.15: Items of Personal Damage—Past Damage—Medical Supplies.

11a. CIVJIG 91.25: Items of Personal Damage—Future Damage—Bodily Harm and Mental Harm.

11b. CIVJIG 91.35: Items of Personal Damage—Future Damage—Loss of Earning Capacity.

11c. CIVJIG 91.30: Items of Personal Damage—Future Dam-

age—Medical Supplies, Hospital, and Medical Expense.

CIVSVF 45.98

INNKEEPER'S LIABILITY—BAR AND INTOXICATED PERSON (INTENTIONAL WRONGDOER) *[New]*

1. Was (defendant bar) negligent?

_____
Yes or No

2. *If your answer to Question 1 was "Yes,"* then answer this question: Was (defendant bar's) negligence a direct cause of (plaintiff's) injury?

_____
Yes or No

3. Was (plaintiff) negligent?

_____
Yes or No

4. *If your answer to Question 3 was "Yes,"* then answer this question: Was this negligence by (plaintiff) a direct cause of (his) (her) injury?

_____
Yes or No

[If you answered "Yes" to Question 2 and "Yes" to Question 4, then answer Question 5]

5. Taking all of the fault that contributed as a direct cause to (plaintiff's) injury, what percentage do you attribute to:

(Defendant bar) _____%

(Plaintiff) _____%

TOTAL 100%

6. Did (defendant/intentional wrongdoer) cause a harmful or offensive contact with (plaintiff)?

_____
Yes or No

7. *If your answer to Question 6 was "Yes,"* then answer this question: Did (defendant/ intentional wrongdoer) intend to cause this contact?

_____
Yes or No

8. *If your answer to Question 7 was "Yes,"* then answer this question: Was this contact a direct cause of (plaintiff's) injury?

_____
Yes or No

[You must answer Questions 9 and 10 regardless of your answers to any of the other questions.]

9. What amount of money will fairly and adequately compensate (plaintiff) for damages directly caused by the injury up to the time of this verdict for:

a.	Past pain, disability and emotional distress	$
b.	Past wage loss	$
c.	Past healthcare expenses	$
d.	Other past loss	$

10. What amount of money will fairly and adequately compensate (person under 21) for damages reasonably certain to occur in the future, directly caused by the (collision) (accident) (event) for:

a.	Future pain, disability and emotional distress	$
b.	Loss of future earning capacity	$
c.	Future healthcare expenses	$
d.	Other future loss	$

USE NOTE

This verdict form assumes an innkeeper-liability suit against a bar and a battery claim against a defendant who committed a battery against the plaintiff. Contributory negligence on the part of a plaintiff can be a defense in the suit against the bar, but cannot be a defense to a claim based on an intentional tort. Therefore, if the bar is found negligent and the plaintiff is contributorily negligent, fault can be compared. The questions concerning the individual defendant's liability for battery come after the comparative fault question in order to avoid confusion. A finding that the individual defendant committed a battery

means that the defendant is jointly and severally liable for the plaintiff's damages, pursuant to Minn. Stat. § 604.02, subd. 1 (3).

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 85.70: Innkeeper's Duty

2. CIVJIG 27.10: Direct Cause.

3. CIVJIG 25.10: Negligence.

4. CIVJIG 27.10: Direct Cause.

5. CIVJIG 28.15: Comparative Fault.

6. CIVJIG 60.25: Battery

7. CIVJIG 60.25: Battery

8. CIVJIG 27.10: Direct Cause

9a. CIVJIG 91.10: Items of Personal Damage—Past Damage—Bodily and Mental Harm

9b. CIVJIG 91.20: Items of Personal Damage—Past Damage—Loss of Earnings.

9c. CIVJIG 91.15: Items of Personal Damage—Past Damage—Medical Supplies.

10a. CIVJIG 91.25: Items of Personal Damage—Future Damage—Bodily Harm and Mental Harm

10b. CIVJIG 91.35: Items of Personal Damage—Future Damage—Loss of Earning Capacity

10c. CIVJIG 91.30: Items of Personal Damage—Future Damage—Medical Supplies, Hospital, and Medical Expense

CIVSVF 45.99

INNKEEPER'S LIABILITY AND CIVIL DAMAGE ACT—BAR AND INTOXICATED PERSON (INTENTIONAL WRONGDOER) *[New]*

1. Was (defendant bar) negligent?

_____
Yes or No

2. *If your answer to Question 1 was "Yes,"* then answer this question: Was (defendant bar's) negligence a direct cause of (plaintiff's) injury?

_____
Yes or No

3. Did (defendant bar) illegally sell an alcoholic beverage to (name of defendant/ intentional wrongdoer)?

_____
Yes or No

4. *If your answer to Question 3 was "Yes,"* then answer this question: Did the illegal sale cause or contribute to the intoxication of (defendant/ intentional wrongdoer)?

_____
Yes or No

5. If *your answer to Question 4 was "Yes,"* then answer this question: Was the intoxication resulting from the illegal sale a direct cause of the (injury)?

_____
Yes or No

6. Was (plaintiff) negligent?

_____
Yes or No

7. *If your answer to Question 6 was "Yes,"* then answer this question: Was this negligence by (plaintiff) a direct cause of (his) (her) injury?

_____
Yes or No

[If you answered "Yes" to Question 2 or 5, or "Yes" to both Questions 2 and 5, and you also answered "Yes" to Question 7, then answer Question 8]

8. Taking all of the fault that contributed as a direct cause to (plaintiff's) injury, what percentage do you attribute to:

(Defendant bar) _____%

(Plaintiff) _____%

TOTAL 100%

9. Did (defendant/intentional wrongdoer) cause a harmful or offensive contact with (plaintiff)?

_____

Yes or No

10. *If your answer to Question 9 was "Yes,"* then answer this question: Did (defendant/intentional wrongdoer) intend to cause this contact?

_____

Yes or No

11. *If your answer to Question 10 was "Yes,"* then answer this question: Was this contact a direct cause of (plaintiff's) injury?

_____

Yes or No

[You must answer Questions 12 and 13 regardless of your answers to any of the other questions.]

12. What amount of money will fairly and adequately compensate (plaintiff) for damages directly caused by the injury up to the time of this verdict for:

a.	Past pain, disability and emotional distress	$
b.	Past wage loss	$
c.	Past healthcare expenses	$
d.	Other past loss	$

13.	What amount of money will fairly and adequately compensate (person under 21) for damages reasonably certain to occur in the future, directly caused by the (collision) (accident) (event) for:	
a.	Future pain, disability and emotional distress	$
b.	Loss of future earning capacity	$
c.	Future healthcare expenses	$
d.	Other future loss	$

USE NOTE

This verdict form assumes both an innkeeper-liability claim and Civil Damage Act claim in a suit against a bar and a battery claim against an individual defendant. Contributory negligence on the part of a plaintiff can be a defense in the suit against the bar, but cannot be a defense to a claim based on an intentional tort. Therefore, if there is a finding of fault on the part of the bar for violating the Civil Damage Act and/or its duty as an innkeeper, and the plaintiff is contributorily negligent, fault can be compared. The questions concerning the individual defendant's liability for battery come after the comparative fault question in order to avoid confusion. A finding that the defendant committed a battery means that the defendant is jointly and severally liable for the plaintiff's damages, pursuant to Minn. Stat. § 604.02, subd. 1 (3).

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 85.70: Innkeeper's Duty
2. CIVJIG 27.10: Direct Cause.
3. CIVJIG 45.10: Illegal Sale—General.
4. CIVJIG 27.10: Direct Cause.
5. CIVJIG 27.10: Direct Cause.
6. CIVJIG 25.10: Negligence.
7. CIVJIG 27.10: Direct Cause.
8. CIVJIG 28.15: Comparative Fault.
9. CIVJIG 60.25: Battery

10. CIVJIG 60.25: Battery

11. CIVJIG 27.10: Direct Cause

12a. CIVJIG 91.10: Items of Personal Damage—Past Damage—Bodily and Mental Harm

12b. CIVJIG 91.20: Items of Personal Damage—Past Damage—Loss of Earnings.

12c. CIVJIG 91.15: Items of Personal Damage—Past Damage—Medical Supplies.

13a. CIVJIG 91.25: Items of Personal Damage—Future Damage—Bodily Harm and Mental Harm

13b. CIVJIG 91.35: Items of Personal Damage—Future Damage—Loss of Earning Capacity

13c. CIVJIG 91.30: Items of Personal Damage—Future Damage—Medical Supplies, Hospital, and Medical Expense

CATEGORY 50

DEFAMATION

INTRODUCTORY NOTE

Add to p.467 in main volume (just above "Common Law Privileges":]

In *Maethner v. Someplace, Inc.*, 929 N.W.2d 868 (Minn. 2019), the supreme court clarified the standards for determining whether a private person is involved in a matter of public concern for purposes of the application of the First Amendment limits the Supreme Court established for defamation cases in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974). The court also expanded the reach of its decision in *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21 (Minn. 1996), which further limits recovery in defamation cases by private persons involved in a matter of public concern.

In cases involving defamation suits by plaintiffs who are neither public officials nor figures, the *Gertz* standards apply to defamatory communications relating to a matter of public concern. In *Richie*, the supreme court held that a plaintiff in a defamation suit against a media defendant and a private defendant who utilized the television media, *id.* at 26 n. 5, must prove actual injury to reputation as a predicate to the recovery of damages for emotional harm. *Id.* at 28. In *Maethner* the court made it clear that in determining whether *Richie*'s limitation applies, "it is the private or public concern of the statements at issue—not the identity of the speaker—that provides the First Amendment touchstone for determining whether a private plaintiff may rely on presumed damages in a defamation action." *Maethner*, 929 N.W.2d at 878.

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749, 760–61 (1985), the Supreme Court held that in determining whether speech is a matter of public concern a court must consider the "content, form, and context" of the communication "as revealed by the whole record. In *Snyder v. Phelps*, 562 U.S. 443, 452 (2011), the Court followed *Dun & Bradstreet's* approach in concluding that particularly scurrilous signs by the Westboro Baptist Church while picketing a military funeral related "to broad issues of interest to society at large, rather than matters of "purely private concern." *Snyder* stated that speech involves "matters of public concern when it can be fairly considered as relating

to any matter of political, social, or other concern to the community," or if the subject of the speech is "of general interest and of value and concern to the public." *Id.* at 453.

In establishing the outline for resolving that issue the *Maethner* court followed the Supreme Court's template in *Dun & Bradstreet* to determine whether the speech involved a matter of public or private concern, considering the "content, form, and context" of the communication "as revealed by the whole record." 472 U.S. at 761.

The defendants in *Maethner* argued that their speech related to domestic violence, which involves a matter of public concern. While the supreme court did not disagree with that conclusion "as a general proposition," it noted that the form and context, along with other relevant factors, had to be considered. 929 N.W.2d at 881. The court focused on media coverage as a key factor in determining whether a public issue is involved, noting *Snyder*'s statement that if an issue is the subject of legitimate news interest it is a good indication of public interest in the issue. Relying on the Eighth Circuit's emphasis on the "importance of journalistic freedom in investigating and reporting on matters of public concern" in *Schuster v. U.S. News & World Report, Inc.*, 602 F.3d 850, 853 (8th Cir. 1979), the court concluded that "dissemination of the statements in the news media" is a factor, but only "one of many relevant factors in determining whether the statements involve a matter of public concern." *Maethner*, 929 N.W.2d at 881.

Add after Common Law Privileges:

Establishment Clause Limitations

In *Pfeil v. St. Matthews Evangelical Lutheran Church*, 877 N.W.2d 528 (Minn. 2016), former church members who were excommunicated brought suit for defamation and negligence against the church and church pastors for defamatory statements made in the course of excommunication proceedings.

The court examined decisions of the Supreme Court of the United States, including the Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), in distilling three rules that apply to cases such as the Pfeils':

> First, a court cannot overturn the decisions of governing ecclesiastical bodies with respect to purely ecclesiastical concerns, such as internal church governance or church discipline. . . . Second, a court may not entertain cases that require the court to resolve doctrinal conflicts or interpret church doctrine . . . Finally, a court may decide disputes involving religious organizations, but only if the court is able to resolve the matter by relying exclusively on

> neutral principles of law, the court does not disturb the ruling of a governing ecclesiastical body with respect to issues of doctrine, and the adjudication does not "interfere[ ] with an internal church decision that affects the faith and mission of the church itself."

877 N.W.2d at 534 (citations omitted).

Applying those principles, the court held that the defamation and related claims were barred by the ecclesiastical abstention doctrine under the First Amendment Establishment Clause, where the statements were made during the course of formal church disciplinary proceedings and were only communicated to other church members and participants in the disciplinary process. *Id.* at 542.

CIVJIG 50.10

DEFAMATORY COMMUNICATION

Replace the existing CIVJIG 50.10 with the following:

A statement or communication is defamatory if it tends to:

1. So harm the reputation of a person that it lowers their esteem in the community, or

2. Deter third persons from associating or dealing with them, or

3. Injures their character, or

4. Subjects them to ridicule, contempt, or distrust, or

5. Degrades or disgraces them in the eyes of others.

[A statement of communication may be defamatory because (defendant):]

[1. Left out certain facts so the statement conveyed a defamatory meaning.]

[2. Linked statements in a way that conveyed a defamatory meaning.]

[3. Stated an opinion that contained defamatory facts.]

CIVJIG 50.25

TRUTH

Replace Part A and Part B in Main Volume on page 481:

PART A

Definition of "false"

Question ____ asks whether the statement (____) was false.

A statement or communication is false if it is not substantially accurate. Substantial accuracy does not require every word to be true. A statement or communication is not substantially accurate if its essence is not true.

[A statement or communication is also false if the implication of the statement is false.]

PART B

Definition of "true"

Question ____ asks whether the statement or communication (____) was true.

A statement or communication is true if it is substantially accurate. Substantial accuracy does not require every word to be true. A statement or communication is substantially accurate if its essence is true.

[A statement or communication is also true if the implication of the statement or communication is true.]

AUTHORITIES

Add to end of Authorities in Main Volume:

In *Larson v. Gannett Co.*, 940 N.W.2d 120 (Minn. 2020), the supreme court considered the relationship between the defense of truth and the fair reporting privilege in a case involving a defamation suit by Larson

against media defendants for the publication of information contained in a police press conference and press release that tagged him as the person who was responsible for killing a Cold Springs police officer. The pattern instruction has been reformulated in light of that opinion. *See id.* at 143 n.15

Alexander v. Ball, No. 70-CV-19-17264, 2021 WL 2201491 (Minn. Ct. App. June 1, 2021), a defamation case, arose out of a negative online review posted by Ball following work that Alexander and his company were hired to do on Ball's townhouse. The district court granted the defendant's motion for summary judgment, holding that the allegedly defamatory statements were substantially true. The court of appeals affirmed.

The court applied the substantial truth test in analyzing the statements:

> " 'If the statement is true in substance, minor inaccuracies of expression or detail are immaterial,' and 'do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge is justified.' " *Id.* at 5 (quoting *McKee v. Laurion*, 825 N.W.2d 725, 730 (Minn. 2013). In applying the substantial truth test, the court also noted that "a statement that has multiple interpretations is not defamatory, if one reasonable interpretation of the statement is substantially true." *Id.*

Quoting *Hunter v. Hartman*, 545 N.W.2d 699, 707 (Minn. Ct. App. 1996), *rev. denied* (Minn. June 19, 1996), the court noted that " 'the substantial truth test is broad: if any reasonable person could find the statements to be supportable interpretations of their subjects, the statements are incapable of carrying a defamatory meaning, even if a reasonable jury could find that the statements were mischaracterizations.' "

CIVJIG 50.30

ABSOLUTE AND QUALIFIED PRIVILEGES

AUTHORITIES

Add the following to Authorities in Volume 4, p. 490, after the last full paragraph:

In *Harlow v. State, Department of Human Services*, 83 N.W.2d 561 (Minn. 2016), the plaintiff, a physician, was terminated from his position with the Minnesota Security Hospital following an incident involving restraint of a patient. The case concerned certain statements made by the former administrator of the hospital and a deputy commissioner of the department of human services to a Minnesota Public Radio reporter and, in the case of the former administrator, to department employees.

The issue was whether the government officials were entitled to absolute immunity for those statements in the defamation suit brought by the plaintiff. The supreme court held that the deputy commissioner was entitled to absolute immunity but the former hospital administrator was not.

In a detailed review of its prior decisions, the court noted it has extended absolute immunity to a "cabinet- equivalent state governmental official for statements made in the course of his or her official duties." *Id.* at 572. Because a deputy commissioner of the Department of Human Services functions as a cabinet-equivalent official within the meaning of the case law, the court held that absolute immunity applied in the plaintiff's claim against him.

The court held that the former hospital administrator was not entitled to absolute immunity, concluding that he was not a cabinet-level executive official of the state government when he made his defamatory statements. He was not explicitly vested by statute with all the powers of the DHS commissioner nor was he empowered to speak on behalf of the DHS Commissioner, as was the deputy commissioner. His work consisted of overseeing day-to-day operations of the Minnesota Security Hospital. *Id.* at 573–74.

In *Huson v. Benilde-St. Margaret's School*, No. A18-0317, 2018 WL 4401726 (Minn. Ct. App. Sept. 17, 2018), a case involving a defamation claim arising out of a student's suspension from a private school, one of the issues was whether the plaintiff had sufficiently established evidence of actual malice to overcome the school's qualified privilege to investigate allegations of alcohol use at the plaintiff's house. The court

initially noted that the privilege was supported because, "[f]lawed or not, the school's suspension rested on an investigation of some substance." *Id.* at *5.

The court of appeals applied the standard from *Elstrom v. Independent School Dist. No. 270*, 533 N.W.2d 51, 56 (Minn. Ct. App. 1995), rev. denied (Minn. July 27, 1995), that proof of actual malice necessary to overcome a qualified privilege "requires, among other things, a showing that the defendant had serious doubts about the truth of the allegedly defamatory statement," in holding that the facts concerning actual malice were insufficient to defeat the defendant's motion for summary judgment. 2018 WL 4401726 at *5.

Fair-Report Privilege

As recognized in *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 333 (Minn. 2000), the fair-report privilege applies to "an accurate and complete report or a fair abridgement of events that area part of the regular business of a city council meeting."

Speech and Debate Clause

In *Olson v. Lesch*, No. A18-1694, 2020 WL 2745411 (Minn. May 27, 2020), the supreme court held that the Speech or Debate Clause of the Minnesota Constitution, Minn. Const. art. IV, § 10, did not provide protection for a state legislator who sent an allegedly defamatory letter to the Mayor of St. Paul suggesting that Olson, the Mayor's choice for city attorney, was not an appropriate choice.

The Speech or Debate Clause reads as follows:

> The members of each house in all cases except treason, felony and breach of the peace, shall be privileged from arrest during the session of their respective houses and in going to or returning from the same. For any speech or debate in either house they shall not be questioned in any other place.

Relying on decisions of the Supreme Court of the United States interpreting the equivalent clause in the federal constitution, the court held that the Speech and Debate Clause did not immunize the defendant from liability.

The purpose of the clause is to " 'protect the integrity of the legislative process by insuring the independence of individual legislators." *Id.* at *4, quoting *United States v. Brewster*, 408 U.S. 501, 507 (1972). Protected speech is not confined solely to speech or debate on the floor of the legislature. The court noted that "the Supreme Court has given the Clause a practical rather than a strictly literal reading,' " *id.* at *4, quoting *Hutchinson v. Proxmire*, 443 U.S. 111 at 124 (1979), "meaning

that the Court has focused on 'whether the actions . . . fall within the 'sphere of legitimate legislative activity,' " *id.*, quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975). While the meaning of the clause has been extended beyond its plain meaning of the text, the Court has not extended it " 'beyond the legislative sphere.' " *Id.* at *4, quoting *Gravel v. United States*, 408 U.S. 606, 624–25 (1972).

More generally, the clause protects "legitimate legislative activity," including "activities that are 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.' " Id. at *5, citing *Gravel*, 408 U.S. at 625.

Applying those principles, the supreme court held that the letter was "not protected legislative activity under" Minnesota's Speech or Debate clause because it did "not fall 'within the sphere of legitimate legislative activity.' " *Id.*, citing *Eastland*, 431 U.S. at 503. The letter was sent when the Legislature was not in session. There was no indication in the letter that the defendant was acting pursuant to his legislative duties. In fact, the court noted, the letter was personal, and it stated that the defendant hoped he and the mayor could resolve the matter internally. *Id.*

The supreme court also noted that nothing in the history or language of the clause suggests that there should be " 'an absolute privilege from liability or suit for defamatory statements made outside the Chamber.' " *Id.*, quoting *Hutchinson*, 443 U.S. at 127.

Legislative Immunity—Minn. Stat. § 540.13

In *Olson v. Lesch*, No. A18-1694 (Minn. May 27, 2020), the supreme court also considered whether the legislative privilege in Minnesota Statutes § 540.13 barred the plaintiff's defamation claim. That statute provides:

> No member, officer, or employee of either branch of the legislature shall be liable in a civil action on account of any act done in pursuance of legislative duties.

Construing the statute for the first time, the court noted that it provided broader protection than the Speech or Debate Clause, but that it did not cover Lesch's letter to the Mayor of St. Paul urging him not to hire Olson as city attorney.

The court held that "the statute extends broader immunity than the Speech or Debate Clause," that "[t]he statute immunizes any act

done by a legislator that helps that legislator perform her legislative function," but also that "there still must be a legislative function, and there is no such function here." 2020 WL 2745411, at *7.

CIVJIG 50.31

FAIR AND ACCURATE REPORTING PRIVILEGE
[New]

A news report is fair and accurate if the statements in the news report convey essentially the same meaning as the statements at (name the proceeding).

USE NOTE

This instruction is intended for use in cases where there is an issue concerning whether a defamatory statement is the subject of the fair and accurate reporting privilege. For a special verdict form that includes a fair and accurate reporting privilege question, *see* CIVSVF 50.98. The Minnesota Supreme Court has held that the fair and accurate reporting privilege applies to a report of statements by law enforcement officers in an official news release and during official press conference; a report on city council proceedings; and/or a report of judicial proceedings.

AUTHORITIES

The fair and accurate reporting privilege is an *exception* to the common law republication rule, which provides that a speaker who knows or should know that a statement is false and defamatory but repeats it nonetheless is equally as liable for the defamation as the original speaker. *See Church of Scientology of Minn. v. Minn. State Med. Ass'n Found.*, 264 N.W.2d 152, 156 (Minn. 1978).

The Minnesota Supreme Court has applied the fair reporting privilege in three cases. *See Larson v. Gannett Co.*, 940 N.W.2d 120 (Minn. 2020); *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 332 (Minn. 2000); and *Nixon v. Dispatch Printing Co.*, 101 Minn. 309, 112 N.W. 258 (1907). The court initially held in *Nixon* that "on principle and authority," there is a privilege to publish a report of "judicial proceedings, if fair and impartial," but limited its holding in concluding that "a complaint or other pleading in a civil action, which has never been presented to the court for its actions, is not a judicial proceeding within the rule, and its publication, if it contains libelous matter, can only be justified by showing that it is true." *Id.* at 313, 112 N.W. at 259.

In *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 332 (Minn. 2000), the court adopted the Restatement (Second) of Torts § 611 (Am. Law Inst. 1976) as the appropriate formulation of the privilege for reports of public proceedings, and applied it to city council proceedings. Section 611 reads as follows:

The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.

The purpose of the privilege is to guarantee "that the public interest is served by the dissemination of information about events occurring at public proceedings and public meetings." 610 N.W.2d. at 331, *citing* Restatement (Second) of Torts § 611 cmt. a.

The privilege rests on two bases. The first is that a fair and accurate report simply relays to the public information that would be available had the reader been present. The second is the obvious public interest in publicizing public affairs.

In *Larson*, the court held that the fair and accurate reporting privilege protects news reports that accurately and fairly summarize statements about a matter of public concern made by law enforcement officers during an official press conference and in an official news release. 940 N.W.2d at 133.

The privilege may be lost if the report is not a fair and accurate representation of the proceedings or meetings. In *Larson*, the court framed the privilege in three slightly different ways stated that for the privilege to apply "the substance of the meaning of the report must be the same—must communicate the same notion—as the underlying statement." *Id.* at 142. The court also stated that "[t]he crucial inquiry for the jury is whether the statements in the news reports communicated to the viewer or reader the same meaning that someone who actually attended the press conference or read the press release would have taken away from the press conference or press release." *Id.* at 143.

CIVJIG 50.40

ACTUAL MALICE—CONSTITUTIONAL STANDARD

AUTHORITIES

Add the following to the end of Authorities:

In *McGuire v. Bowlin*, 932 N.W.2d 819 (Minn. 2019), a high school basketball coach brought a defamation suit against parents who complained about his coaching of girls' basketball teams. A key issue in the case was whether he was a public official for purposes of applying the actual malice standard in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The Minnesota Supreme Court held that he was not.

The supreme court revisited its decision in *Britton v. Koep*, 470 N.W.2d 518 (Minn. 1991), in which it set out standards for determining whether a person could be deemed to be a public official. According to *Britton*, classification of a person as a public official turns on whether the person performs governmental duties that are "directly related to the public interest," holds "a position to influence significantly the resolution of public issues," and has, or appears to have, "substantial responsibility for or control over the conduct of governmental affairs. *Id.* at 522.

In applying the first criterion, the court called into question its decision in *Hirman v. Rogers*, 257 N.W.2d 563 (Minn. 1977), in which it held that a police officer was a public official. The court in *Britton* noted that *Hirman* established very broad criteria for purposes of determining whether a person could be deemed a public official, criteria that the court noted in *McGuire* were so broad that "taken literally, it would extend from the lowest level of government employees all the way to elected officials." *Id.* at 824. The court considered the potential breadth of that decision to be inconsistent with the Supreme Court's clear suggestion in *Hutchinson v. Proxmire*, 442 U.S. 111, 119 n.8 (1979), that the public figure designation should be inapplicable at lower levels of government.

The court then took the "opportunity to make explicit what was implicit in *Britton*," in stating that "the public official inquiry does not end with whether McGuire was performing governmental duties directly related to the public interest," but requires that it instead "weigh society's interest in open, public debate about the performance of the duties of a high school basketball coach against society's interest in protecting reputation." 932 N.W.2d at 824. In a concise summary of that balancing, the court said that while "McGuire was employed by the school

district, his coaching duties are ancillary to core functions of government; put simply, basketball is not fundamental to democracy." *Id.* at 825. His specific governmental duties were unrelated to core government functions and they did not have a substantial impact on a substantial portion of the public at large. *Id.*

The second *Britton* factor as applied to McGuire was whether he was in a position to significantly influence the resolution of public issues. The court concluded that McGuire was not in a position to do so. *Id.*

The final *Britton* factor was whether he actually or apparently had "substantial responsibility for or control over the conduct of government affairs." The court concluded that he did not. *Id.* 826.

The respondents also argued that McGuire, if not a public official, was a limited-purpose public figure. The court held that he was not. Applying its three-factor analysis from *Chafoulias v. Peterson*, 668 N.W.2d 642, 648–49 (Minn. 2003), the court held first that there was no public controversy in which McGuire was involved, noting that "a party cannot stir up controversy by making defamatory statements and then point to the resulting controversy as a basis for assigning the defamed party public-figure status." 932 N.W.2d at 829. Even if there were a public controversy over the issue of "high school sports," the court concluded that it painted "with too broad a brush," and also because "[c]ontroversies must be capable of 'resolution.' " *Id.*, quoting *Chafoulias*, 668 N.W.2d at 653. The court concluded that McGuire was not a public figure. 932 N.W.2d at 829.

In *MacDonald v. Brodkorb*, 939 N.W.2d 468 (Minn. Ct. App. 2020), the Minnesota Court of Appeals held that a perennial candidate for election to the Minnesota Supreme Court is a limited purpose public figure for purposes of applying the actual malice standard in *New York Times Co. v. Sullivan.* MacDonald ran for election to the court three times. She alleged that Brodkorb defamed her in various ways, including that she was involved in the disappearance of sisters of a client of hers, that her conviction for driving under the influence was affirmed by the court of appeals, and repeatedly publishing a photograph made to appear as a "mug shot," implying that she was a criminal, mentally ill, or drunk.

The court of appeals applied the standards used by the supreme court in *Chafoulias* in determining that MacDonald was a limited-purpose public figure. The standards turn on whether there was a public controversy; whether the plaintiff played a meaningful role in that controversy; and whether the allegedly defamatory statement was related to that controversy.

The court first concluded that a contested election for the office of

justice of the Minnesota Supreme Court met the two-element test for determining whether a public controversy exists. First, an election for the supreme court involves "[t]he qualitative merit of two persons competing to retain or obtain one of seven seats on the court, which "constitutes a real and public debate." Second, it has substantial ramifications affecting all individuals with business before the courts. 939 N.W.2d at 478. The court then held that MacDonald played a meaningful role in the controversy because of her active involvement in the election. Finally, the court concluded that the allegedly defamatory statements were relevant to her fitness for the office of supreme court justice. *Id.*

MacDonald argued that she should not be treated as a public figure as defamatory comments in the interim between elections. The court rejected that argument, holding that "a candidate for public office is a limited-purpose public figure and that a recurring candidate remains a public figure between formal election periods." *Id.* at 479–80.

The court did not cite *McGuire v. Bowlin* in its opinion. The only difference in the opinions concerns the supreme court's statement in *McGuire* that a public controversy had to be capable of resolution. Even applying that standard, however, elections would meet that standard because they are resolved every election cycle.

The court of appeals also noted that the determination of whether a person is a public figure is a question of law for the court, but that "it is a question of law that might involve disputes of material facts," and, citing *Chafoulias*, that there are alternative methods of resolving those factual disputes, including " 'submission to a jury for special interrogatory verdicts or under specific instruction as to the elements of the privilege,' or 'pretrial submission to the district court for determination by specific findings of fact based upon an evidentiary hearing.' " *Id.* 477, quoting *Chafoulias*, 658 N.W.2d at 650.

In *Nelson Auto Center, Inc. v. Multimedia Holdings Corp.*, 951 F.3d 952 (8th Cir.2020), the court held that a corporation was a public figure under Minnesota law. The case arose out of a KARE 11 news story related to an overbilling scheme involving a former fleet manager who overcharged police departments for their vehicles. Nelson Auto brought suit against several defendants, alleging that the story was defamatory. The defendants moved to dismiss for failure to state a claim upon which relief could be granted.

The court first held that Nelson was a public figure. Kare 11 argued that under Minnesota law, all corporations are public figures, but based on *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 487 (Minn.1985) and *Northwest Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1393 (8th Cir. 1997) (applying Minnesota law),

Nelson argued that only highly regulated industries are public figures. The court rejected the argument, noting that *Jadwin* held that " 'corporate plaintiffs in defamation actions must prove actual malice by media defendants when the defendants establish that the defamatory material concerns matters of legitimate public interest in the geographic area in which the defamatory material is published, either because of the nature of the business conducted or because the public has an especially strong interest in the investigation or disclosure of the commercial information at issue.' " 951 F.3d at 957, quoting *Jadwin*, 367 N.W.2d 487–88.

The court noted that "[a]s the Minnesota Supreme Court noted in *Jadwin* . . . and as *Gertz* makes clear, Minnesota is free to categorize corporations as public figures that must prove actual malice even if federal law does not." *Id.*

SPECIAL VERDICT FORMS

CIVSVF 50.98

FAIR AND ACCURATE REPORTING PRIVILEGE
[New]

1. Was the news report about the (proceeding) in the (name the proceeding) fair and accurate?

Yes ____ No ____

2. *If your answer to question # 1 was "No,"* then answer this question: were the statements defamatory?

Yes ____ No ____

3. *If your answer to question # 2 was "Yes,"* then answer this question: were the statements false?

Yes ____ No ____

USE NOTE

This special verdict form is intended for use in cases in which the fair and accurate reporting privilege is raised. For a discussion of that privilege, *see* CIVJIG 50.31.

Following the supreme court's opinion in *Larson v. Gannett*, 940 N.W.2d 120 (Minn. 2020), the verdict form first asks the question of whether the fair and accurate reporting privilege applies. If it does, there is no need to consider the issues of whether the statements were defamatory or false.

This special verdict form assumes a plaintiff who is a public official, figure, or is involved in a matter of public concern. In each of those cases the plaintiff will have the burden of proving the falsity of the defamatory statement.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 50.10: Fair and Accurate Reporting Privilege

2. CIVJIG 50.10: Defamatory Communication

3. CIVJIG 50.25: Truth

CATEGORY 55

EMPLOYER AND EMPLOYEE

PART A

EMPLOYMENT-RELATED TORT CLAIMS

INTRODUCTORY NOTE

Add to page 587 just above the paragraph beginning with "In a sexual harassment case based. . ."

In *Kenneh v. Homeward Bound, Inc.*, No. A18-0174, 2020 WL 2893352 (Minn. June 3, 2020), the Minnesota Supreme Court carefully considered the standards for determining whether sexual harassment sufficient to establish a violation of the Human Rights Act exists. The plaintiff sued Homeward Bound, claiming violations of the Minnesota Human Rights Act, including a claim for sexual harassment. The district court granted Homeward Bound's motion for summary judgment, concluding that some of the employee's actions were "boorish and obnoxious," but that "however objectionable," it was insufficient to "constitute pervasive, hostile conduct that changes the terms of employment and exposes an employer to liability under the Minnesota Human Rights Act." The court of appeals affirmed. *Id.* at 2.

At the outset Kenneh asked the supreme court to reject its reliance on federal Title VII case law in evaluating sexual harassment claims that are based on a hostile work environment. Drawing on federal case law, the supreme court has held that discriminatory conduct must be so severe or pervasive that it alters the plaintiff's conditions of employment and creates an abusive working environment. *Id.* at *3, quoting *Goins v. W. Grp.*, 635 N.W.2d 717, 725 (Minn. 2001) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

Kenneh urged the court to adopt a more liberal standard than the "severe or pervasive" standard for resolving sexual harassment claims. The supreme court declined to do to, finding no compelling reason to abandon its precedent. The court took the "opportunity to clarify how the severe-or-pervasive standard applies to claims arising under the Human Rights Act," however. *Id.* at *5.

First, the court noted that its use of the severe-or-pervasive framework drawn from Title VII cases does not mean that Minnesota courts are bound by "the conclusions drawn by those courts in any particular circumstances." *Id.*

Second, the court noted that the standard for making that determination "must evolve to reflect changes in societal attitudes towards what is acceptable behavior in the workplace," a concept the court

recognized in *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 378 (Minn. 1990), when the court noted that "the 'essence' of the Human Rights Act is 'societal change,' " and that the " '[r]edress of individual injuries caused by discrimination is a means of achieving that goal.' " The court continued, stating that "[t]oday, reasonable people would likely not tolerate the type of workplace behavior that courts previously brushed aside as an "unsuccessful pursuit of a relationship," *id.* at *5, citing and overruling to the extent it is inconsistent with the supreme court's opinion, *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 203 (Minn. Ct. App. 2010). The court distinguished similar cases tolerating inappropriate behavior. *See Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 935 (8th Cir. 2002) ("boorish, chauvinistic, and decidedly immature" behavior); *see generally McMiller v. Metro*, 738 F.3d 185, 188–89 (8th Cir. 2013) (collecting cases of "inappropriate" but not actionable behavior).

Third, the court set out the factors to be considered in making the determination of whether there is actionable sex discrimination in a particular case in two places in its opinion. It first stated that the fact-finder must consider:

> [T]he totality of the circumstances, 'including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' "

Id., quoting *Goins v. W. Grp.*, 635 N.W.2d 717, 725 (Minn. 2001).

The court also stated that in making the determination, " 'all the circumstances surrounding the conduct alleged to constitute sexual harassment, such as the nature of the incidents and the context in which they occurred, should be examined.' " *Id.* at *5, quoting *Cont'l Can Co. v. State*, 297 N.W.2d 241, 249 (Minn. 1980). The court noted that the test is not " 'mathematically precise.' " *Id.*, quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).

Summarizing, the court stated that:

> "Each case must stand on its own circumstances." . . . Put another way, each case in Minnesota state court must be considered on its facts, not on a purportedly analogous federal decision. A single, severe incident may support a claim for relief . . . Pervasive incidents, any of which may not be actionable when considered in isolation, may produce an objectively hostile environment when considered as a whole.

Id. at *6 (citation omitted).

The court added that its decision is not intended to "transform the

Human Rights Act into a general civility code," but cautioned courts "against usurping the role of a jury when evaluating a claim on summary judgment." *Id.*

CIVJIG 55.25

NEGLIGENT SUPERVISION

AUTHORITIES

Add the following to the end of the Authorities:

In *Doe YZ v. Shattuck–St. Mary's School*, 214 F.Supp.3d 763 (D. Minn. Oct. 5, 2016), a case arising out of the sexual abuse of students at Shattuck-St. Mary's by a teacher, the defendant argued in its motion for summary judgment that the plaintiffs' claims for negligent supervision and retention failed because they alleged only emotional abuse rather than the required physical injury.

Minn. Stat. § 541.073, subd. 1 (1), defines "sexual abuse" to mean "conduct described in Minn. Stat. §§ 609.342 to 609.3451, the criminal sexual conduct statues. Those statutes define personal injury as "bodily harm . . . or severe mental anguish or pregnancy." The supreme court held in *W.J.L. v. Bugge*, 573 N.W.2d 677, 681 (Minn. 1998), that sexual abuse and injury are coextensive under the statutes. The district court concluded that the plaintiffs' allegations of emotional and physical harm were sufficient to raise a fact question as whether they suffered physical harm sufficient to justify recovery for negligent supervision.

CIVJIG 55.30

NEGLIGENT RETENTION

AUTHORITIES

Add the following to the end of the Authorities:

In *Doe YZ v. Shattuck–St. Mary's School*, 214 F.Supp.3d 763 (D. Minn. Oct. 5, 2016), a case arising out of the sexual abuse of students at Shattuck-St. Mary's by a teacher, the defendant argued in its motion for summary judgment that the plaintiffs' claims for negligent supervision and retention failed because they alleged only emotional abuse rather than the required physical injury.

Minn. Stat. § 541.073, subd. 1 (1), defines "sexual abuse" to mean "conduct described in Minn. Stat. §§ 609.342 to 609.3451, the criminal sexual conduct statues. Those statutes define personal injury as "bodily harm . . . or severe mental anguish or pregnancy." The supreme court held in *W.J.L. v. Bugge*, 573 N.W.2d 677, 681 (Minn. 1998), that sexual abuse and injury are coextensive under the statutes. The district court concluded that the plaintiffs' allegations of emotional and physical harm were sufficient to raise a fact question as whether they suffered physical harm sufficient to justify recovery for negligent retention.

PART B

CLAIMS ARISING OUT OF THE EMPLOYMENT RELATIONSHIP

INTRODUCTORY NOTE

Insert the following at p. 607 of the main volume, following the discussion of Pine River State Bank:

In *Hall v. City of Plainview*, 954 N.W.2d 254 (Minn. 2021), defendant city Plainview terminated Hall, the longtime manager of the municipal liquor store. Over the course of nearly 30 years in the position, Hall accumulated 1778.73 hours of unused paid time off (PTO). When Plainview refused to pay Hall his accrued PTO, Hall brought suit, alleging among other claims, breach of contract. Hall asserted the city's employee handbook created a contractual obligation for the city to pay him the accrued PTO. Plainview denied it was in breach of the handbook policies, and also asserted that the handbook did not constitute a unilateral contract, first, because its terms were not definite in form, as required by *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983). Second, Plainview contended that express disclaimer language in the handbook, stating the policies should not be construed as contract terms, defeated Hall's contract claim. On Plainview's motion, the district court dismissed Hall's contract claim, and the court of appeals affirmed. *Id.* at 2019 WL 6695142 (Minn. Ct. App. Dec. 19, 2019).

The supreme court held, first, that the handbook was a unilateral contract and the policies concerning PTO were sufficiently definite to constitute a unilateral contract. "The terms are sufficiently definite for a court to discern with specificity what the provisions require of the City and determine whether there was a breach." *Hall*, 954 N.W.2d at 262.

With respect to the effect of the disclaimer language, the supreme court noted it had "never directly addressed whether a general disclaimer in an employee handbook stating the provisions of the handbook are not intended to create a contract necessarily defeats the formation of a contract for every provision in the handbook." *Hall*, 954 N.W.2d at 263. The supreme court examined two general disclaimer provisions in the handbook. One stated that the handbook policies were "not intended to create an express or implied contract of employment" and immediately preceded language concerning the grievance, disciplinary, and termination provisions of the handbook. The court held that the "language of this provision is aimed at preserving the City's ability

to terminate an employee at its sole discretion; it has no bearing on the issue of payment of accrued PTO." *Id.* at 266. The second disclaimer provision followed a statement that the purpose of the handbook polices was to establish a uniform and equitable system of personnel administration. The court concluded "this broad and general contract disclaimer language in the Handbook's introduction, in the context of the entire Handbook and the relationship between the City and its employees, is ambiguous as to its applicability to the PTO policy." *Id.* at 266. The supreme court remanded the contract claim, ruling that "the question of the impact of the Handbook's general disclaimer on Hall's claim is for a fact-finder to determine." *Id.* at 267.

Whistleblower Claims

Add to the end of the first paragraph:

The six-year statute of limitations set forth in Minn. Stat. § 541.05, subd. 1(2), is applicable to a claim under § 181.932, subd. 1(1) of the Whistleblower Act. *Ford v. Minneapolis Pub. Schs.*, 874 N.W.2d 231, 233 (Minn. 2016).

Replace the final paragraph at p. 610 of the main volume and remaining text in the Introductory Note with the following:

In *Obst v. Microtron, Inc.*, 614 N.W.2d 196 (Minn. 2000), the Minnesota Supreme Court held that for a report to be made in good faith it must be made for the purpose of exposing an illegality. The Minnesota Legislature amended the whistleblower statute in 2013 by, among other things, adding a definition of "good faith." The Minnesota Supreme Court considered the impact of the 2013 amendment on the *Obst* definition of "good faith" in *Friedlander v. Edwards Lifesciences, LLC*, 900 N.W.2d 162 (Minn. 2017). In that case, the United States District Court for the District of Minnesota certified a question to the Minnesota Supreme Court asking whether "the 2013 amendment to the Minnesota Whistleblower Act defining the term 'good faith'. . . eliminates the judicially created requirement that the putative whistleblower act with the purpose of 'exposing an illegality.' " *Friedlander v. Edwards Lifesciences, LLC*, 900 N.W.2d 162 at 162. The Minnesota Supreme Court held:

> In *Obst*, we provided a definition of 'good faith' that filled a gap in the statute. But in 2013, the Legislature provided its own definition. We must adhere to the plain language of that definition and give effect to all parts of the amended Act. . . The Act now tells us that reports are made in 'good faith' as long as those reports are not knowingly false or made with reckless disregard of the truth.

Friedlander, 900 N.W.2d at 165–166.

Minnesota Fair Labor Standards Act

The supreme court considered an employment claim arising out of the Minnesota Fair Labor Standards Act (MFLSA), Minn. Stat. §§ 177.21-.35 (2016), in *Burt v. Rackner*, 902 N.W.2d 448 (Minn. 2017). Todd Burt worked as a bartender for Rackner from 2007 until his termination in 2014. Following his termination, Burt brought suit against Rackner alleging that he had been terminated for failing to share his tips with other employees in violation of Minn. Stat. § 177.24, subd. 3. The supreme court ruled that § 177.27, subd. 8 "unambiguously allows an aggrieved employee to sue for any violation of the statute, which creates a broad, private right of action in favor of employees harmed by an employer's violation of the MFLSA." *Id.* at 455. The court held that "the MFLSA, by express wording, provides a cause of action for an employee who is terminated for refusing to share tips." *Id.* at 457.

CIVJIG 55.35

EMPLOYMENT CONTRACTS—HANDBOOKS OR MANUALS

AUTHORITIES

Insert the following at the end of the Authorities:

In *Hall v. City of Plainview*, 954 N.W.2d 254 (Minn. 2021), defendant city Plainview terminated Hall, the longtime manager of the municipal liquor store. Over the course of nearly 30 years in the position, Hall accumulated 1778.73 hours of unused paid time off (PTO). When Plainview refused to pay Hall his accrued PTO, Hall brought suit, alleging, among other claims, breach of contract. Hall asserted the city's employee handbook created a contractual obligation for the city to pay him the accrued PTO. Plainview denied it was in breach of the handbook policies, and also asserted that the handbook did not constitute a unilateral contract, first, because its terms were not definite in form, as required by *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983). Second, Plainview contended that express disclaimer language in the handbook stating the policies should not be construed as contract terms defeated Hall's contract claim. On Plainview's motion, the district court dismissed Hall's contract claim, and the court of appeals affirmed. *Id.* at 2019 WL 6695142 (Minn. Ct. App. Dec. 19, 2019).

The supreme court held, first, that the handbook was a unilateral contract and the policies concerning PTO were sufficiently definite to constitute a unilateral contract. "The terms are sufficiently definite for a court to discern with specificity what the provisions require of the City and determine whether there was a breach." *Hall*, 954 N.W.2d at 262.

With respect to the effect of the disclaimer language, the supreme court noted it had "never directly addressed whether a general disclaimer in an employee handbook stating the provisions of the handbook are not intended to create a contract necessarily defeats the formation of a contract for every provision in the handbook." *Hall*, 954 N.W.2d at 263. The supreme court examined two general disclaimer provisions in the handbook. One stated that the handbook policies were "not intended to create an express or implied contract of employment" and immediately preceded language concerning the grievance, disciplinary, and termination provisions of the handbook. The court held that the "language of this provision is aimed at preserving the City's ability to terminate an employee at its sole discretion; it has no bearing on the issue of payment of accrued PTO." *Id.* at 266. The second disclaimer

provision followed a statement that the purpose of the handbook polices was to establish a uniform and equitable system of personnel administration. The court concluded "this broad and general contract disclaimer language in the Handbook's introduction, in the context of the entire Handbook and the relationship between the City and its employees, is ambiguous as to its applicability to the PTO policy." *Id.* at 266. The supreme court remanded the contract claim, ruling that "the question of the impact of the Handbook's general disclaimer on Hall's claim is for a fact-finder to determine." *Id.* at 267.

CIVJIG 55.65

EMPLOYMENT TERMINATION IN VIOLATION OF PUBLIC POLICY—THE WHISTLEBLOWER ACT

AUTHORITIES

Add to the end of the first paragraph:

The six-year statute of limitations set forth in Minn. Stat. § 541.05, subd. 1(2), is applicable to a claim under § 181.932, subd. 1(1) of the Whistleblower Act. *Ford v. Minneapolis Pub. Schs.*, 874 N.W.2d 231, 233 (Minn. 2016).

In *Moore v. City of New Brighton*, 932 N.W.2d 317 (Minn. Ct. App. 2019), *rev. denied* (Minn. Oct. 15, 2019), the Minnesota Court of Appeals held that the city's adverse actions against a police officer following his filing of a union grievance because of the city's failure to pay overtime could constitute adverse action under the Whistleblower Act. The case raised several issues requiring interpretation of the Act.

Before reaching the Whistleblower Act claim, the court of appeals first held that Moore was not required to exhaust his administrative remedies under the Public Employees Labor Relations Act, Minn. Stat. § 179A.01–.25 (2018), before he could bring his claim under the Minnesota Whistleblower Act. The city argued that the district court lacked jurisdiction over the case because Moore's whistleblower claim was essentially a claim that the city breached its collective bargaining agreement and that PERLA required him to exhaust his administrative remedies under the Act before bringing his whistleblower claim. While noting that the general rule is that an employee is required to exhaust administrative remedies before bringing suit under PERLA, *id.* at 322, citing *Edina Educ. Ass'n v. Board of Education of Independent School District No. 273*, 562 N.W.2d 306, 310 (Minn. App. 1997), the court of appeals rejected the argument because Moore asserted a concurrent remedy under the Whistleblower Act.

In determining whether the district court erred in granting summary judgment to the city on Moore's claim, the court of appeals applied "the now customary burden-shifting analysis" from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), "that Minnesota courts have adopted and applied at summary judgment in employer-retaliation claims under various statutes," 932 N.W.2d at 323.

The court incorporated the statutory elements of the Whistleblower Act that Moore was required to prove:

To prevail on his claim under the Minnesota Whistleblower Act,

Moore must prove that the city "discharge[d], discipline[d], threaten[ed], otherwise discriminate[d] against, or penalize[d]" him regarding his "compensation, terms, conditions, location, or privileges of employment because" Moore, "in good faith, report[ed] a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official." Minn. Stat. § 181.932, subd. 1(1) (2018). We incorporate these statutory elements into the burden-shifting test.

Id.

The three-part *McDonnell-Douglas* standard the court applied in determining whether summary judgment was properly required on Moore's retaliation-penalization claim requires proof of "(1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two." 932 N.W.2d at 323, quoting *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983).

The court first determined that Moore's claim established statutorily-protected conduct. The conduct protected from employer retaliation under the Whistleblower Act is the good-faith report of a suspected violation "of any federal or state law or common law or rule adopted pursuant to law to an employer." Minn. Stat. § 181.932, subd. 1(1). The court of appeals held that "Moore's whistleblower claim rests on alleged employer retaliation against him for his having filed a union grievance, a grievance that accused the city of violating its contractual duty to make overtime payments," and that his "grievance was, in essence . . . a breach-of-contract allegation." *Id.*

Second, the court had "no difficulty concluding that, as a matter of law, an employee's assignment to administrative leave might in some circumstances constitute a penalty under the whistleblower statute." *Id.* at 325. The Whistleblower Act defines the term "penalize" to include conduct "that might dissuade a reasonable employee from making or supporting a report." Minn. Stat. § 181.931, subd. 5 (2018). The court noted that this statutory definition had not previously been construed in any case in Minnesota, but concluded that the "operative terms, 'might dissuade' and 'reasonable employee,' are plain and unambiguous, and they suggest an inclusive reach into a wide variety of unspecified employer behavior." *Id.* The court concluded that there was no categorical exclusion in the definition of the decision of an employer to investigate and remove an employee from active service by placing the employee on extensive administrative leave. *Id.*

The court also concluded that other conduct by the city, including Moore's reassignment to an administrative position, a negative perfor-

mance evaluation, and his placement on a counseling and coaching plan constituted adverse employment action. The court held that the proper approach on a motion at the summary judgment stage is to consider how the actions might be viewed collectively by the factfinder:

> [A] factfinder could reasonably infer that the city's decisions to investigate Moore and place him on extended administrative leave share the same retaliatory motive as its decision to reassign him to a less active position when his leave finally ended. The same is so for the "coaching and counseling" directive and poor performance review. That these followed almost immediately after the city allowed Moore to return to work under his reassigned duties tends to support a similar inference about those decisions. The inference is especially reasonable since some evidence suggests that Moore's supervisors never considered disciplining him for alleged performance deficiencies or attitude issues in his decades of service before the grievance. So although the district court may have been correct in deeming the reassignment, performance evaluation, and coaching directive as unlikely, individually, to dissuade a reasonable employee from engaging in protected conduct, we reach a different conclusion by considering these actions as a collective with the city's investigative and leave actions. Under the circumstances, the evidence is sufficient to create a fact dispute as to the city's motives on these things.

Id. at 328.

Third, the court of appeals accepted the district court's conclusion that there was sufficient evidence of causation to defeat the motion for summary judgment:

> There was approximately one month between the grievance and the investigations and approximately two months between the grievance and the administrative leave. Moore makes a great deal of [public-safety director]'s dislike of grievances. In context, [public-safety director]'s testimony may not constitute direct evidence of a causal link between Moore's grievance and the retaliatory conduct, but it does provide circumstantial and inferential evidence of such a causal link. Moreover, the unique and disproportionate approach to the initiation of an internal affairs investigation in a manner which did not seem to have any precedent or comparison, and the administrative leave which left Moore hanging for months after both investigations had been concluded also create enough evidence of a causal link to avoid summary judgment on the element of causation.

Id.

Moore also argued that the city's action in reassigning him to an

administration position, issuing a negative performance review, and his placement on a counseling and coaching plan were also adverse actions within the meaning of the statute. Taking those actions in the aggregate, the court of appeals concluded that the fact finder could conclude that those actions constituted retaliation. *Id.*, citing *Quinn v. St. Louis County*, 653 F.3d 745, 751 (8th Cir. 2011) (considering retaliation under the Minnesota Human Rights Act); *Noviello v. City of Boston*, 398 F.3d 76, 94 (1st Cir. 2005) (aggregate facts established hostile work environment); *Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010) (alleged acts of retaliation must be considered separately and in the aggregate because "even minor acts of retaliation can be sufficiently substantial in gross as to be actionable").

The proffer of a nonretaliatory justification shifts the burden back to the plaintiff to show that the justification is only a pretext for retaliation. *Id.* at 329. The court of appeals noted that "[a] plaintiff can satisfy his burden of showing pretext 'either directly by persuading the court that a discriminatory reason likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' " *Id.*, quoting *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn. 1986). Because of a factual dispute as to the underlying factual premise for the city's proffer and because the court concluded that the city's explanation for a months-long suspension was dubious, the court concluded that summary judgment on the issue was inappropriate. *Id.* at 329–30.

CIVJIG 55.66

GOOD FAITH

Replace the existing instruction, Use Note, and Authorities with following:

Good Faith

A report is made in good faith if it is not knowingly false or made with reckless disregard of the truth.

USE NOTE

This instruction is intended for use in cases where the good faith of the employee making the report is in issue in a whistleblower case brought pursuant to M.S.A. § 181.932, subd. 1(1). It should be given after CIVJIG 55.65.

AUTHORITIES

In *Obst v. Microtron, Inc.*, 614 N.W.2d 196 (Minn. 2000), the Minnesota Supreme Court held that for a report to be made in good faith it must be made for the purpose of exposing an illegality. The Minnesota Legislature amended the whistleblower statute in 2013 by, among other things, adding a definition of "good faith." The Minnesota Supreme Court considered the impact of the 2013 amendment on the *Obst* definition of "good faith" in *Friedlander v. Edwards Lifesciences, LLC*, 900 N.W.2d 162 (Minn. 2017). In that case, the United States District Court for the District of Minnesota certified a question to the Minnesota Supreme Court asking whether "the 2013 amendment to the Minnesota Whistleblower Act defining the term 'good faith'. . . eliminates the judicially created requirement that the putative whistleblower act with the purpose of 'exposing an illegality.' " *Friedlander v. Edwards Lifesciences, LLC*, 900 N.W.2d at 162. The Minnesota Supreme Court held:

> In *Obst*, we provided a definition of 'good faith' that filled a gap in the statute. But in 2013, the Legislature provided its own definition. We must adhere to the plain language of that definition and give effect to all parts of the amended Act. . . The Act now tells us that reports are made in 'good faith' as long as those reports are not knowingly false or made with reckless disregard of the truth.

Friedlander, 900 N.W.2d at 165–166.

CATEGORY 57

FRAUD AND MISREPRESENTATION

CIVJIG 57.10

FRAUD AND MISREPRESENTATION

AUTHORITIES

Add the following to the end of the Authorities:

TCI Business Capital, a commercial factoring company, exercised its contractual rights and seized equipment in which it had a security interest from customer-debtor. Brian Flynn, TCI's chief risk officer, represented to TCI that the equipment had been sold at auction, as directed by TCI's chief executive officer. In reality, there was no auction. Instead, Flynn created a series of transactions to obtain more money for the equipment and improve TCI's perception of his performance. After Flynn had left the company, TCI learned he had falsified records concerning the auction and brought a lawsuit against him, alleging among other claims, fraudulent misrepresentation. *TCI Business Capital, Inc. v. Five Star American Die Casting, LLC*, 890 N.W.2d 423 (Minn. Ct. App. 2017). The district court granted Flynn's summary judgment motion with respect to TCI's fraudulent misrepresentation claim.

On appeal, TCI argued its evidence established Flynn intended to induce reliance on his misrepresentations because he intended to induce TCI to believe an auction had occurred and continue to employ him. Flynn contended he intended to maximize TCI's return. Noting that no Minnesota case resolved the argument, the court of appeals cited with approval language from the Restatement (Second) of Torts, § 531, "which explains that the intent-to-induce element of a fraudulent-misrepresentation claim is satisfied if the defendant intended the plaintiff 'to act or refrain from action' or 'had reason to expect' that the plaintiff would act or refrain from action." *TCI Business Capital*, 890 N.W.2d at 433. The court of appeals held the requisite intent may be present even if Flynn did not reap any personal gain, and that the undisputed facts showed that Flynn intended to induce TCI to rely on his misrepresentations. *Id.*

CIVJIG 57.40

CONSUMER FRAUD

AUTHORITIES

Add the following to the end of the Authorities:

Two competing companies providing mobile magnetic-resonance-imaging (MRI) services to chiropractors, Mobile Diagnostic Imaging (MDI) and Stand-Up MidAmerica MRI (SUMA), became embroiled in litigation. *Mobile Diagnostic Imaging, Inc. v. Hooten*, 889 N.W.2d 27, (Minn. Ct. App. 2016). SUMA brought a counterclaim against MDI under the Consumer Fraud Act, Minn. Stat. § 325F.69, alleging MDI's fraudulent practices induced consumers to select MDI, rather than SUMA. MDI moved to dismiss the claim for failure to state a legally sufficient claim for relief because SUMA did not allege its counterclaim benefitted the public. The court of appeals affirmed the district court's dismissal of SUMA's consumer-fraud claim against MDI on the grounds that SUMA was a sophisticated competitor of MDI, the consumers of MDI's services were patients, and SUMA's counterclaim failed to provide a public benefit to these consumers. *MDI*, 889 N.W.2d at 35.

In *State v. Minnesota School of Business*, No. A17-1740, 2018 WL 2470706 (Minn. Ct. App. June 4, 2018), a case involving claims by the State under the Minnesota Consumer Fraud Act (MCFA) and the Uniform Deceptive Trade Practices Act (UDTPA) based on misrepresentations concerning the schools' two-year criminal justice program, the court of appeals held that there must be proof of a causal nexus between the wrongful conduct and the harm sustained by consumers, and that the causal nexus may not be presumed as matter of law.

The district court found for the State in a bench trial. On appeal, one of the issues was whether the court applied the correct causation standard. In *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 15 (Minn. 2001), the supreme court noted that there is a reliance component in determining whether there is a causal nexus between the alleged fraud and the consume injury. The district court concluded that there was sufficient evidence of reliance to satisfy the standard, which included anecdotal evidence by some of the students about the direct harm they suffered because of the wrongful acts of the school. The district court concluded that the consequence of the wrongful conduct "was so inevitable and foreseeable" that it necessarily satisfied the *Group Health* causal-nexus requirement. The court of appeals held that this was not a new standard, as the defendants argued, but rather a framing of the reliance requirement in terms of the natural conse-

quences of the actions of the school and the evidence that was presented at the trial.

The district court concluded that not all claimants had to establish direct evidence of reliance however. The court of appeals concluded that while "*Group Health* stands for the proposition that district courts have a wide range of discretion in accepting relevant evidence to satisfy the causal-nexus element, it does not stand for the application of a rebuttable presumption." *State v. Minnesota School of Business*, 2018 WL 2470706, at *6.

CATEGORY 59

INSURANCE

INTRODUCTORY NOTE

[Add to end of Introductory Note:]

Liability for Failure to Pay Benefits

In 2008, the Legislature adopted the following statute, Minn. Stat. § 604.18, providing for the award of taxable costs and damages if an insurer lacked a reasonable basis for denying benefits and the insurer knew of the lack of a reasonable basis for that denial. The statute reads in full as follows:

Subdivision 1. Terms. For purposes of this section, the following terms have the meanings given them.

(a) "Insurance policy" means a written agreement between an insured and an insurer that obligates an insurer to pay proceeds directly to an insured. Insurance policy does not include provisions of a written agreement obligating an insurer to defend an insured, reimburse an insured's defense expenses, provide for any other type of defense obligation, or provide indemnification for judgments or settlements. Insurance policy does not include:

(1) coverage for workers' compensation insurance under chapter 176;

(2) a written agreement of a health carrier, as defined in section 62A.011;

(3) a contract issued by a nonprofit health service plan corporation regulated under chapter 62C that provides only dental coverage;

(4) a written agreement authorized under section 60A.06, subdivision 1, clause (4) or (6), or 64B.16, subdivision 1; or

(5) a written agreement issued pursuant to section 67A.191.

(b) "Insured" means a person who, or an entity which, qualifies as an insured under the terms of an insurance policy on which a claim

for coverage is made. An insured does not include any person or entity claiming a third-party beneficiary status under an insurance policy.

(c) "Insurer" means every insurer, corporation, business trust, or association engaged in insurance as a principal licensed or authorized to transact insurance under section 60A.06, but for purposes of this section an insurer does not include a political subdivision providing self-insurance or a pool of political subdivisions under section 471.981, subdivision 3. The term does not include the Joint Underwriting Association operating under chapter 62F or 62I.

Subd. 2. Liability. (a) The court may award as taxable costs to an insured against an insurer amounts as provided in subdivision 3 if the insured can show:

(1) the absence of a reasonable basis for denying the benefits of the insurance policy; and

(2) that the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a reasonable basis for denying the benefits of the insurance policy.

(b) A violation of this section shall not be the basis for any claim or award under chapter 325D or 325F.

(c) An insurer does not violate this subdivision by conducting or cooperating with a timely investigation into arson or fraud.

Subd. 3. Damages and costs. (a) In addition to prejudgment and postjudgment interest and costs and disbursements allowed under law, the court may award an insured the following taxable costs for a violation of subdivision 2:

(1) an amount equal to one-half of the proceeds awarded that are in excess of an amount offered by the insurer at least ten days before the trial begins or $250,000, whichever is less; and

(2) reasonable attorney fees actually incurred to establish the insurer's violation of this section.

Attorney fees may be awarded only if the fees sought are separately accounted for by the insured's attorney and are not duplicative of the fees for the insured's attorney otherwise expended in pursuit of proceeds for the insured under the insurance policy. Attorney fees must not exceed $100,000.

(b) An insured may not also recover punitive or exemplary damages or attorney fees under section 8.31 for a violation of this section.

Subd. 4. Claim for taxable costs. (a) Upon commencement of a civil action by an insured against an insurer, the complaint must not seek a recovery under this section. After filing the suit, a party may make a motion to amend the pleadings to claim recovery of taxable costs under this section. The motion must allege the applicable legal basis under this section for awarding taxable costs under this section, and must be accompanied by one or more affidavits showing the factual basis for the motion. The motion may be opposed by the submission of one or more affidavits showing there is no factual basis for the motion. At the hearing, if the court finds prima facie evidence in support of the motion, the court may grant the moving party permission to amend the pleadings to claim taxable costs under this section.

(b) An award of taxable costs under this section shall be determined by the court in a proceeding subsequent to any determination by a fact finder of the amount an insured is entitled to under the insurance policy, and shall be governed by the procedures set forth in Minnesota General Rules of Practice, Rule 119.

(c) An award of taxable costs under this section is not available in any claim that is resolved or confirmed by arbitration or appraisal.

(d) The following are not admissible in any proceeding that seeks taxable costs under this section:

(1) findings or determinations made in arbitration proceedings conducted under section 65B.525 or rules adopted under that section;

(2) allegations involving, or results of, investigations, examinations, or administrative proceedings conducted by the Department of Commerce;

(3) administrative bulletins or other informal guidance published or disseminated by the Department of Commerce; and

(4) provisions under chapters 59A to 79A and rules adopted under those sections are not admissible as standards of conduct.

(e) A claim for taxable costs under this section may not be assigned. This paragraph does not affect the assignment of rights not established in this section.

Subd. 5. Insurance producers; liability limited. A licensed insurance producer is not liable under this section for errors, acts, or omissions attributed to the insurer that appointed the producer to transact business on its behalf, except to the extent the producer has caused or contributed to the error, act, or omission.

In *Peterson v. Western National Mutual Insurance Co.*, No. A1801081, 2020 WL 4342929 (Minn. July 29, 2020), the supreme court interpreted subdivision 2(a) of the statute, which provides that a court may award taxable costs to an insured against an insurer as provided for in subdivision 3, if the plaintiff proves:

> (1) the absence of a reasonable basis for denying the benefits of the insurance policy; and
>
> (2) that the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a reasonable basis for denying the benefits of the insurance policy.

The first prong of the test is objective. The court held that the proper inquiry is

> whether a reasonable insurer under the circumstances would not have denied the insured the benefits of the insurance policy. In applying that standard, the factfinder should consider the level of investigation a reasonable insurer would have conducted under the circumstances of the case and how a reasonable insurer would have evaluated the claims in light of that investigation. The insurer's evaluation of the insured's claim must be fair. A fair evaluation means an evaluation that considers and weighs all of the facts and circumstances that a reasonable insurer would consider relevant.
>
> *Id.* at *4.

In applying the second prong, the mens rea element, the court concluded that "[t]he plain language of the statute tells us that this subjective inquiry concerns whether the insurer knew, or recklessly disregarded information that would have allowed it to know, that it lacked an objectively reasonable basis for denying the claim." *Id.* at *6. Because the two prongs of the statute were drawn directly from a Wisconsin Supreme Court case, *Anderson v. Continental Insurance Co.*, 271 N.W.2d 368 (Wis. 1978), the Minnesota Supreme Court followed that court's explanation of the inquiry:

> "[T]he knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is a reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured." *Id.* at 377. Further, "[i]t is appropriate, in applying the test, to determine whether a claim was properly investigated and whether the results of the investigation were subjected to a reasonable evaluation and review." *Id.* The insurer's actual investigation and evaluation are relevant to this prong of the analysis. In sum, the second prong of

the statutory insurer standard of conduct requires an insured to prove that the insurer knew, or recklessly disregarded or remained indifferent to information that would have allowed it to know, that it lacked an objectively reasonable basis for denying the insured's claim for benefits

Id.

CIVJIG 59.40

INSURANCE AGENT AND BROKER DEFINED

AUTHORITIES

Add the following to Authorities in Volume 4, p. 704, after the last full paragraph:

Traditionally, an insurance broker acts on behalf of a prospective insured and an insurance agent acts on behalf of a particular insurance carrier. *See Eddy v. Republic Nat'l Life Ins. Co.*, 290 N.W.2d 174, 176 (Minn. 1980). In *Graff v. Robert M. Swendra Agency, Inc.*, 800 N.W.2d 112 (Minn. 2011)—a case cited in the existing Authorities—the court in dicta stated "This distinction, however, appears to have been superseded by statute," citing to Minn. Stat. § 60K.49. *Graff*, 800 N.W.2d at 118, n.5.

Minn. Stat. §§ 60K.30–60K.56 govern the qualifications and procedures for the licensing of insurance producers. The statute in question, § 60K.49, subd. 1 provides that "A person performing acts requiring a producer license under this chapter is at all times the agent of the insurer and not the insured." This section has been on the books since 2001, but is based on an earlier statute, § 60K.15, which provided that "[a]ny person who solicits insurance is the agent of the insurer and not the agent of the insured."

There are two cases that have cited § 60K.49 when considering whether a person was acting as an insurer's agent. *See Hemingway v. First Nat. Ins. Co. of America*, 2014 WL 2864919 (D. Minn. June 24, 2014), and *BMT Enterprises, Inc. v. Hartford Cas. Ins. Co.*, 2012 WL 2884862 (D. Minn. July 13, 2012).

The dicta in *Graff* suggested that it appeared the statute eliminated the traditional distinction between broker and agent. *But see Benincasa v. Lafayette*, 2011 WL 5967300 (D. Minn. Nov. 29, 2011) (holding that the statute was part of a licensing scheme and not relevant to determining whether the defendant was acting as an agent for an insurer); and, *Berg v. Reimer*, 2001 WL 856443 (Minn. Ct. App. July 31, 2001) (holding that the predecessor statute was a licensing statute and not applicable to a determination of whether the defendant was an agent or broker).